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No.

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In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

This case concerns the two major equitable exceptions, and the most frequently used statutory exception, to the general "American Rule" against awarding attorney fees to a prevailing party. The questions presented are:

1. Did the Sixth Circuit *en banc* incorrectly hold, in direct conflict with decisions in at least six other circuits, that the "bad faith" exception to the American Rule is limited to bad faith in the litigation process, and does not permit attorney fees based on bad faith in the conduct giving rise to the plaintiff's underlying claims?

2. Did the Sixth Circuit *en banc* misconstrue *Hall v. Cole*, 412 U.S. 1 (1973) in holding, in conflict with six other circuits, that the "common benefit" exception to the American Rule does not apply to successful actions under the Labor-Management Reporting Disclosure Act ["LMRDA"] when the plaintiff union member obtains damages rather than injunctive relief?

3. Did the Sixth Circuit *en banc* incorrectly hold that petitioner's civil rights claims under 42 U.S.C. §§1985(3) and 1986 "were not substantial," and thereby incorrectly deny attorney fees under 42 U.S.C. §1988 for petitioner's success on his non-civil rights claims?

LIST OF PARTIES TO PROCEEDINGS BELOW

JOHN C. SHIMMAN: Plaintiff-Appellee

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18: Defendant-Appellant

John C. Shimman is the Petitioner herein; International Union of Operating Engineers, Local 18 is the Respondent.

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner John C. Shimman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 1, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (*en banc*) is reported at 744 F.2d 1226 and is reprinted at A1 of the Appendix to this Petition. The vacated panel opinion of the United States Court of

Appeals for the Sixth Circuit is reported at 719 F.2d 879 and is reprinted at A103 of the Appendix. The opinions of the United States District Court for the Northern District of Ohio dated October 20, 1981 and May 11, 1982, are unreported and are reprinted at A90 and A97 of the Appendix respectively.

The opinion of the United States Court of Appeals for the Sixth Circuit on the previous appeal is reported as *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980), and excerpts of that opinion are reprinted at A59 of the Appendix.

JURISDICTION

The judgment sought to be reviewed by this Petition was rendered and entered on October 1, 1984. This Petition for Certiorari is filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Because of their length, the following statutes are set forth verbatim in the Appendix, A115-A118:

29 U.S.C. §§411(a)(1) and 411(a)(2);
29 U.S.C. §412;
42 U.S.C. §1985(3);
42 U.S.C. §1986;
42 U.S.C. §1988.

STATEMENT OF THE CASE

A. Background.

Petitioner John C. Shimman, a member of respondent International Union of Operating Engineers, Local 18 ["Local 18"], was assaulted and beaten by union members and unknown thugs during a regular union meeting in Toledo, Ohio, on September 11, 1972. He thereafter filed suit in the United States District Court against respondent Local 18, three individuals, and the International Union of Operating Engineers ["International Union"], claiming violations of his rights under §101(a) of the Labor-Management Reporting Disclosure Act of 1959 ["LMRDA"] (also known as the Landrum-Griffin Act), 29 U.S.C. §411(a); under 42 U.S.C. §§1985(3) and 1986; and under the Ohio common law of assault and battery. Jurisdiction was based upon federal question jurisdiction, 28 U.S.C. §1331; the LMRDA, 29 U.S.C. §412; civil rights jurisdiction, 28 U.S.C. §§1343(a)(1) and 1343(a)(2); and principles of pendent jurisdiction.

On October 16, 1975 the district court found all defendants liable on petitioner's claims under the LMRDA and his pendent assault and battery claim, A29, 31-37, 38-43, but dismissed petitioner's claims under 42 U.S.C. §§1985(3) and 1986. A37-38. The district court found that respondent Local 18 and the other defendants conspired to deprive petitioner, a union dissident leader, of his free speech and political rights under 29 U.S.C. §§411(a)(1) and (a)(2), the so-called "Bill of Rights of Members of Labor Organizations", by beating him in retaliation for the exercise of those rights. A29, 31-37, 43. The district court found petitioner's beating to be the successful culmination of a plan

by incumbent union management to intimidate and silence the dissident movement within District Two of Local 18. A43, 32-33, 37.

On February 14, 1977, the district court awarded Shimman $107,067.99 in compensatory damages and a total of $675,000 in punitive damages. A45, 57, 58. Based on the "bad faith" exception to the general "American Rule" against awarding attorney fees to the prevailing party, the district court also awarded petitioner $75,000.00 in attorney fees for the trial. A56, 58. Although defendants had contested the allowance of attorney fees, they stipulated that the amount was reasonable. A57.

B. Respondent's 1980 Appeal.

All defendants, including respondent, appealed. The Court of Appeals, *Shimman v. Frank,* 625 F.2d 80 (6th Cir. 1980), upheld the district court's findings of fact and affirmed the imposition of liability against all defendants except the International Union. A59, 68-79. Petitioner's compensatory damages were upheld in full. A80-82. The punitive damages award was affirmed, although the amount was reduced. A88-89. The trial attorney fee award was affirmed "because of defendants' malicious conduct". A82.

The Court of Appeals found it unnecessary to reach petitioner's cross-appeal from the dismissal of his claims under 42 U.S.C. §§1985(3) and 1986. A63 n.10.

C. The Award Of Appellate Attorney Fees.

After the 1980 Court of Appeals decision, petitioner filed an application, supported by affidavits and time records, A98, 104, for additional attorney fees in the district court, seeking $56,178.00 as a reasonable attorney

fee for the 1980 appeal. Although respondent argued that the district court was without discretion or authority to award any fees for the appeal, respondent and the other defendants did not request a hearing, and did not contest the reasonableness of the fee amount sought by petitioner. A95, 98, 100, 104, 3. The district court awarded petitioner the additional attorney fees requested. A94-96.

Respondent and the other defendants then moved for a new trial or to amend judgment pursuant to Fed.R. Civ.P. 59(a) and (e). The district court denied the motion on May 11, 1982, A102, finding that respondent had waived any right to object to the *amount* of fees requested by petitioner or the way in which the fees were calculated. A97-102.

D. Respondent's Appeal Of The Appellate Fee Award.

Respondent Local 18 appealed.[1] On October 21, 1983, a panel of the Court of Appeals affirmed the judgment of the district court in an opinion published at 719 F.2d 879, based on the "bad faith" exception to the "American Rule". A103, 104-05. After granting respondent's petition for rehearing on December 5, 1983, A109, the Court of Appeals sitting *en banc* reversed the attorney fee award on October 1, 1984. A1, 25, 113-14. Petitioner now seeks review in this Court of the October 1, 1984 *en banc* judgment of the Court of Appeals.

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1. The appellate attorney fee award was assessed jointly and severally against respondent and the individual defendants, John Frank, James Grothaus, and Terry Grothaus, A95-96, but only respondent appealed. Nothing has ever been paid on this attorney fee judgment by any of the defendants.

REASONS FOR GRANTING THE WRIT

A. Introduction.

A decision by the Supreme Court is necessary to correct a substantial conflict among the circuits concerning the limits of the equitable exceptions to the American Rule, and to resolve important questions under 42 U.S.C. §1988. The inter-circuit conflicts and errors created by the Sixth Circuit are summarized below.

First, the *en banc* decision of the Sixth Circuit, that the bad faith exception for awarding attorney fees does not encompass malice or bad faith in the "conduct giving rise to the underlying claim", is in conflict with decisions in every other federal circuit in the country, as well as previous decisions of the Sixth Circuit. Moreover, the Sixth Circuit's decision conflicts with several other circuits' interpretations of this Court's decisions on the American Rule, including *Alyeska Pipe Line Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), *Hall v. Cole,* 412 U.S. 1 (1973) and *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116 (1974).

Second, the Sixth Circuit has construed this Court's decision in *Hall v. Cole, supra,* incorrectly and in an unprecedented manner that also creates a conflict among the circuits, by holding the "common benefit" exception inapplicable to this LMRDA case.

Third, in rejecting petitioner's theory under 42 U.S.C. §1988, the Sixth Circuit erroneously held petitioner's §1985(3) claim to have been "not substantial" within the meaning of *Maher v. Gagne,* 448 U.S. 122, 130-33 (1980), when the very existence of *United Brotherhood of Carpenters v. Scott,* 103 S. Ct. 3352 (1983) demonstrates that petitioner's claim was "substantial". Moreover, the lower

court construed *Smith v. Robinson*, 104 S. Ct. 3457 (1984), in a manner that would overrule *Maher v. Gagne* and ignore the legislative history of §1988.

B. The Sixth Circuit's "Bad Faith" Holding Is Unprecedented Among The Circuits And Creates A Conflict With Every Other Circuit.

The Sixth Circuit *en banc* held that the bad faith exception does not permit an award of attorney fees "based only on bad faith in the conduct giving rise to the underlying claim." A14.[2] Rather, the bad faith exception is limited to bad faith "occurring during the course of the litigation" or "in bringing an action or in causing an action to be brought." A7.

In so holding, the Sixth Circuit (1) expressly overruled its 1980 decision upholding the trial attorney fees on the alternative basis of the bad faith exception, which had been the law of the case, A14 n.11, A4 n.3; (2) expressly overruled an earlier Sixth Circuit decision to the contrary, A13 n.10; (3) expressly recognized that its holding is in-

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2. The pre-litigation bad faith in this case is conclusively established. As the district court found, "[i]t would be hard to imagine a clearer case of malice, wicked conduct, violence, and oppression than the one revealed by the evidence at the liability hearing in this case." A52. The district court found that "[t]he Court has no doubt that [Local 18] had determined that it would be necessary to use physical violence to beat the members of District 2 into submission, and that the named individual defendants were the agents selected for the purpose," A43, that defendant John Frank, the District Representative appointed by Local 18 to head District 2, "was sent to get rid of the so-called 'dissident' members of District 2", A41, and "that when all other means of silencing dissent had failed, blood was made to flow in the union hall." A37.

In upholding these factual findings, the Court of Appeals stated that "[w]e fully accept the [district] court's finding of heinous behavior." A86. The Court found "ample evidence in the record supporting a finding of liability against Local 18". A77. This evidence even included veiled discussions of murder when defendant Frank was recruiting union members for violence. A72.

consistent with decisions by the Eighth and Ninth Circuits, A13 n.10, A8 n.7; A14, and (4) cited no decision by any court anywhere in the country holding that the bad faith exception does not apply to bad faith in the acts giving rise to the substantive claim.

In fact, this *en banc* holding directly conflicts with decisions in six other circuits, in addition to previous decisions of the Sixth Circuit, all of which expressly approved an attorney fee award under the bad faith exception solely for bad faith in the defendant's actions that were the subject of the plaintiff's underlying claims. These conflicting decisions are organized by circuit in the margin,[3] and many of them came during the nine years

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3. *D.C. Circuit*: *Schlein v. Smith*, 160 F.2d 22, 25 (D.C. Cir. 1947) (fees awarded for bad faith in gross, willful fraud which was the subject of the litigation).

First Circuit: *McEnteggart v. Cataldo*, 451 F.2d 1109, 1111-12 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972) (awarding fees; cited with approval in *F. D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116, 129 n.17 (1974) for bad faith exception).

Third Circuit: *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 57-58, 63 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976).

Fourth Circuit: *Bell v. School Board of Powhatan Cty., Virginia*, 321 F.2d 494, 500, 495-98 (4th Cir. 1963) (*en banc*); *Rolax v. Atlantic Coastline R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951).

Fifth Circuit: *McDonald v. Oliver*, 525 F.2d 1217, 1228, 1232-33 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976); *Miller v. Carson*, 563 F.2d 741, 754 n.26 (5th Cir. 1977) (affirming district court fee award on basis of bad faith in actions/inaction underlying substantive claim, *see Miller v. Carson*, 401 F. Supp. 835, 857 (M.D. Fla. 1975)).

Sixth Circuit: Cases overruled or limited by Sixth Circuit *en banc* decision now under review: *Shimman v. Frank*, 625 F.2d 80, 100-01 (6th Cir. 1980) (A14 n.11); *Huecker v. Milburn*, 538 F.2d 1241, 1245 n.9, 1246 n.12 (6th Cir. 1976) (A13 n.10).

Eighth Circuit: *Richardson v. Communication Workers of America*, 530 F.2d 126, 132, 133 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976); *Food Handlers Local 425 v. Valmac Industries*, 528 F.2d 217, 219 (8th Cir. 1975) (bad faith in fraud that was subject of underlying action, citing *Alyeska*).

after this Court's decision in *Alyeska*, widely regarded as the modern watershed in the law of attorney fees.

In addition to creating a conflict with these six other circuits, the Sixth Circuit holding is inconsistent with decisions in an additional three circuits, which approved an attorney fee award either using this pre-litigation bad faith exception as an alternative ground with some other American Rule exception,[4] or on alternative grounds of both pre-litigation bad faith and bad faith during litigation.[5] *See Sims v. Amos*, 340 F. Supp. 691, 693-94 (M.D. Ala.), *aff'd*, 409 U.S. 942 (1972).[6] Finally, the Sixth Cir-

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4. *Ninth Circuit*: *Higgins v. Hardin*, 644 F.2d 1348, 1352 (9th Cir. 1981); *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1306, 1305-06 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980).

See also Pete v. United Mine Workers of America Welfare & Retirement Fund of 1950, 517 F.2d 1275, 1279, 1292-93 (D.C. Cir. 1975) (*en banc*) (bad faith was defendants' "protracted discriminatory conduct and breach of fiduciary duty", the underlying conduct that was subject of plaintiffs' substantive claim, *see Kiser v. Miller*, 364 F. Supp. 1311, 1320 (D.D.C. 1973)).

5. *Second Circuit*: *Stolberg v. Members of Board of Trustees for State Colleges of Connecticut*, 474 F.2d 485, 490-91 (2nd Cir. 1973) (bad faith included "unreasonable, obdurate obstinacy" in underlying conduct leading to the lawsuit).

Seventh Circuit: *Bond v. Stanton*, 528 F.2d 688, 689-90 (7th Cir. 1976), *vacated on other grounds*, 429 U.S. 973 (1977).

See also McQuiston v. Marsh, 707 F.2d 1082, 1086 (9th Cir. 1983) (acknowledged by Sixth Circuit *en banc* opinion to conflict with its bad faith holding, A9, 13 n.10); *Doe v. Poelker*, 515 F.2d 541, 547-48 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519, 521 n.2 (1977) (per curiam) (obstinance and "wanton disregard" for plaintiff's rights giving rise to underlying action; awarding trial and appellate attorney fees under bad faith exception, citing *Alyeska*); *Fairley v. Patterson*, 493 F.2d 598, 605-06 (5th Cir. 1974) (defendants had been "unreasonably and obdurately obstinate" in illegal actions/inaction giving rise to underlying claim).

6. In *Sims v. Amos*, 409 U.S. 942 (1972), this Court summarily affirmed a three-judge federal court that awarded attorney fees to successful plaintiffs in an apportionment case, on alternative grounds of the bad faith exception and the "private attorney general" rationale later rejected in *Alyeska*. *Sims v. Amos*, 340 F. Supp. 691, 693-95 (M.D. Ala. 1972). In *Alyeska*,

(Continued on following page)

cuit holding is inconsistent with decisions in the two remaining circuits, that have recognized in dicta that the bad faith exception encompasses bad faith in the actions underlying the plaintiff's substantive claims.[7] Among the

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Footnote continued—
three years later, this Court held that its rejection of the "private attorney general" basis for attorney fees was consistent with its summary affirmance in *Sims v. Amos*, because the *Sims* award was based on the alternative ground of bad faith. *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 210, 270 n.46 (1975). A summary affirmance by the Supreme Court, of course, represents a decision on the merits and constitutes precedent binding upon the lower federal courts, *see Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975), and the bad faith fee award in *Sims* was both bad faith in the underlying conduct that necessitated the litigation and the bad faith defense of the suit by the defendant. No distinction was made between these two types of bad faith. *Sims v. Amos, supra*, 340 F. Supp. at 693-94.

7. *Tenth Circuit*: *Stoddard v. School Dist. No. 1, Lincoln City, Wyoming*, 590 F.2d 829, 835 (10th Cir. 1979).

Eleventh Circuit: *See Local 317, National Post Office Mail Handlers, etc. v. National Post Office Mail Handlers, etc.*, 696 F.2d 1300, 1303 (11th Cir. 1983).

See also Piney Woods Country Life School v. Shell Oil Co., 726 F.2d 225, 241-42 (5th Cir. 1984) (denying fees because of absence of bad faith either before or during the litigation); *Dogherra v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982) (acknowledged by Sixth Circuit *en banc* opinion to conflict with its bad faith holding, A13 n.10); *Barton v. Drummond Co.*, 636 F.2d 978, 985 (5th Cir. 1981) (bad faith exception encompasses bad faith in actions giving rise to underlying claim); *Wood v. Mills*, 528 F.2d 321, 325 (4th Cir. 1975) (denying fees because underlying gender discrimination was not done "with discriminatory intent or with malice", citing *Alyeska*); *Hallmark Clinic v. North Carolina Dep't of Human Resources*, 519 F.2d 1315, 1317 (4th Cir. 1975) (per curiam) (denying bad faith attorney fees because underlying actions were not in bad faith); *Burbank v. Twomey*, 520 F.2d 744, 749-50 (7th Cir. 1975) (denying bad faith fees, finding no bad faith in conduct which was the subject of the litigation); *Hander v. San Jacinto Junior College*, 519 F.2d 273, 280 (5th Cir. 1975) (denying fees because defendant's underlying actions were not in bad faith or "obdurate obstinacy"); *Incarcerated Men of Allen County Jail v. Fair*, 507 F.2d 281, 284, 286-87 (6th Cir. 1974) (affirming fee award on grounds other than bad faith exception because there was no finding of bad faith either before or during litigation); *Newman v. State of Alabama*, 522 F.2d 71, 72, 78, 80 (5th Cir. 1975) (*en banc*) (per curiam) (Gewin, J. dissenting on other grounds: bad faith in underlying conduct leading to the litigation is part of the bad faith exception, citing *Hall v. Cole*).

conflicting decisions are *en banc* decisions by the D.C., Third and Fourth Circuits.

This pre-litigation bad faith exception has been applied by other circuits in LMRDA actions. For example, in *McDonald v. Oliver,* 525 F.2d 1217 (5th Cir.), *cert. denied,* 429 U.S. 817 (1976), individual union members who prevailed in their action under Titles I and III of the LMRDA were awarded attorney fees, not only against their union under the "common benefit" exception, but also against the individual defendants under the bad faith exception. 525 F.2d at 1228, 1232-33. In affirming the fee award against the individuals, the Fifth Circuit cited *Alyeska* and *Hall v. Cole,* and relied strictly upon bad faith in the actions which were the subject of the plaintiffs' underlying LMRDA claims. *Id.* Similarly, the Ninth Circuit in *Higgins v. Hardin,* 644 F.2d 1348 (9th Cir. 1981) affirmed an attorney fee award against the defendant union in an LMRDA action, on alternative grounds of the common benefit and bad faith exceptions. 644 F.2d at 1352. The only bad faith the Court referred to was bad faith in the illegal actions underlying the LMRDA claims. *Id.*

The conflicting circuit decisions have not limited application of the pre-litigation bad faith exception to LMRDA cases. For example, *Skehan v. Board of Trustees of Bloomsburg State College,* 538 F.2d 53 (3d Cir.) (*en banc*), *cert. denied,* 429 U.S. 979 (1976) was a civil rights action decided prior to the enactment of the attorney fee provision in 42 U.S.C. §1988. On remand for reconsideration in light of, *inter alia,* the *Alyeska* decision, the Third Circuit, sitting *en banc,* reviewed the Supreme Court and lower court authorities and held that a pre-litigation bad faith exception to the American Rule exists and survives *Alyeska.* 538 F.2d at 57-58. In so doing, the Court specifically held that the bad faith exception is not limited to bad faith in the litigation process. *Id.* at 57. Another

application of the pre-litigation bad faith exception is *Richardson v. Communication Workers of America*, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976) in which the Eighth Circuit approved an attorney fee award under the bad faith exception because of the defendant union's bad faith in the breach of its duty of fair representation, the same conduct that was the subject of the plaintiff's underlying claim. 530 F.2d at 132, 133.

C. The Sixth Circuit's "Bad Faith" Holding Conflicts With Prior Decisions Of The Supreme Court, As Interpreted By Several Other Circuits.

Although this Court has never definitively answered the question whether the bad faith exception applies to bad faith in the actions underlying a plaintiff's substantive claims, there are at least three ways to view this Court's major attorney fee decisions as implicitly approving this type of bad faith exception.

First, in *Hall v. Cole*, 412 U.S. 1 (1973) the Court twice indicated that the bad faith exception encompasses the type of bad faith that victimized petitioner in this case. In discussing the bad faith exception, the Court cited with approval two Fourth Circuit cases that awarded bad faith fees because of the bad faith conduct giving rise to the plaintiff's substantive claims. 412 U.S. at 5.[8] In addition,

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8. *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (4th Cir. 1963) and *Rolax v. Atlantic Coastline R. Co.*, 186 F.2d 473 (4th Cir. 1951). In *Rolax*, the defendant's "discriminatory and oppressive conduct" relied upon to support the attorney fee award, 186 F.2d at 481, was unquestionably the defendant union's conduct in negotiating a discriminatory collective bargaining agreement, the same conduct challenged by the plaintiffs' underlying claim. The Sixth Circuit opinion below expressly recognized this. A8. In *Bell*, the defendants may also have been obstinate in the litigation, but the Fourth Circuit *en banc* appears to have awarded fees based upon bad faith ("the long continued pattern of evasion and obstruction" to plaintiff's constitutional rights) in the same actions that plaintiffs challenged in their substantive claims. *See* 321 F.2d at 497-98, 500, 495-96.

in the context of discussing the bad faith exception, this Court stated:

> It is clear, however, that "bad faith" may be found, *not only in the actions that led to the lawsuit,* but also in the conduct of the litigation.

412 U.S. at 15 (emphasis added). The Sixth Circuit felt itself free to ignore this clear statement in *Hall v. Cole*, claiming that it referred not to the bad faith exception but rather to the relative equities of the parties and their impact on the "common benefit" rationale. A11-12. That reading is incorrect,[9] is apparently unprecedented, and conflicts with the reading at least four other circuits have given this passage, namely that the bad faith exception encompasses bad faith "in the actions that led to the lawsuit".[10] Indeed, this Court has since quoted the above passage from *Hall v. Cole* with approval, unquestionably in the broader context of the bad faith exception rather

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9. The discussion of the relative equities of the parties' positions was concluded in the paragraph preceding the one containing the quoted statement. *See* 412 U.S. at 14-15. In context, the Supreme Court was responding to a different argument of the petitioners, namely that the absence of bad faith by defendants in illegally disciplining the union member precluded an award of attorney fees. The Court's response was twofold, first that there was bad faith in the conduct of the litigation, and the bad faith exception is not limited to "the actions that led to the lawsuit", and second that bad faith is not a requirement for application of the common benefit rationale. *See* 412 U.S. at 15.

10. The D.C. Circuit has read this passage in *Hall v. Cole* the way petitioner does, *see Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 182 n.40 (D.C. Cir. 1980) (per curiam) (dictum), as have several of the cases cited in footnotes 4, 5 and 7 of this petition: *Barton v. Drummond Co., supra*, 636 F.2d at 985 (5th Cir.) (dictum); *Bond v. Stanton, supra*, 528 F.2d at 689-90 (7th Cir.); *McQuiston v. Marsh, supra*, 707 F.2d at 1086 (9th Cir.). In addition, the Sixth Circuit in this case overruled two earlier Sixth Circuit decisions reading the *Hall v. Cole* passage the way petitioner does. *Huecker v. Milburn, supra*, 538 F.2d at 1245 n.9. *See* A13 n.10; A14 n.11.

than any discretionary weighing of equities under any American Rule exception.[11]

The second major indication from this Court of the scope of the bad faith exception is *Alyeska Pipe Line Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In referring to the bad faith exception as one of the exceptions to the American Rule that are "unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations", 421 U.S. at 259, this Court cited its earlier decision in *F. D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116, 129 (1974). The cited page in *F. D. Rich*, in turn, cited with approval three decisions among the Circuits that awarded attorney fees for bad faith in the conduct giving rise to the litigation. *See F. D. Rich Co., Inc. v. United States, etc., supra*, 417 U.S. at 129 n.17.[12] As in *Hall v. Cole*, this implies approval of the bad faith exception including the type of bad faith involved in this case. The Third Circuit, sitting *en banc*, has read *Alyeska* and *F. D. Rich* together to reach this conclusion.[13]

Third, in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), this Court approved an award of attorney fees against a defendant shipowner for its bad faith failure to obey its duty to pay maintenance and cure to a seaman. The fees were awarded because of the shipowner's "willful

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11. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

12. The cases cited with approval in *F. D. Rich* were the *Bell* and *Rolax* cases, discussed in footnote 8 of this petition, and *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

13. *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 57-58, 63 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976) (on remand from Supreme Court for reconsideration in light of *Alyeska*); *see also Parker v. Shonfeld*, 409 F. Supp. 876, 883, 883 n.8 (N.D. Calif. 1976) (same reasoning).

and persistent" breach of this clear duty. 369 U.S. at 530-31.[14]

The Sixth Circuit's attempt to distinguish the pre-litigation bad faith in *Vaughan* from that in the present case, A7-8, is inconsistent with the interpretation of *Vaughan* by the Third Circuit *en banc* in *Skehan v. Board of Trustees of Bloomsburg State College, supra,* 538 F.2d at 57-58, and ignores the relevant parallel between the two cases.[15]

The Court should take this opportunity to resolve the confusion and conflict involving every circuit in the country, and clarify whether the bad faith exception includes bad faith in the defendant's actions underlying the plaintiff's substantive claims. The existence of a conflict among the circuits on this question nine years after *Alyeska* and eleven years after *Hall v. Cole* strongly suggests that the time is ripe for decision by the Supreme Court on this question.

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14. Although *Vaughan* was an admiralty case, and referred to the attorney fee award as an item of compensatory damages, later Supreme Court cases have cited *Vaughan* for the general bad faith exception to the American Rule, thus indicating that it is not limited to admiralty law or the law of compensatory damages. *See, e.g., Alyeska Pipe Line Service Co. v. Wilderness Society, supra,* 421 U.S. at 258-59; *F. D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., supra,* 417 U.S. at 129 n.17; *Hall v. Cole, supra,* 412 U.S. at 5.

15. In *Vaughan,* the seaman's right to maintenance and cure (and the shipowner's corresponding duty to provide it) arose when the seaman became ill on ship, *see* 369 U.S. at 531, but the seaman in *Vaughan* had no cause of action for maintenance and cure until the shipowner violated its duty to pay maintenance and cure. The shipowner's bad faith breach of this duty, that is, its bad faith in the very conduct that was *actionable,* was the bad faith permitting attorney fees under what later Supreme Court decisions characterized as the general bad faith exception to the American Rule. Similarly, in this case respondent's violation of petitioner's LMRDA rights was the *actionable* conduct, and respondent's bad faith in that conduct vests the district court with discretion under the bad faith exception to award attorney fees.

D. The Sixth Circuit's "Common Benefit" Holding Is Inconsistent With This Court's Decision In Hall v. Cole, And Conflicts With Decisions In At Least Six Other Circuits.

1. Hall v. Cole

The Sixth Circuit *en banc* held that as a matter of law the *Hall v. Cole* common benefit exception "does not apply to this case." A16.

In affirming the award of attorney fees to the successful LMRDA plaintiff in *Hall v. Cole,* this Court held that the federal courts have discretion to award attorney fees in cases where a single union member vindicates "his own right of free speech guaranteed by §101(a)(2) of Title I of the LMRDA". 412 U.S. at 8, 4-9. In so doing, the Supreme Court set forth the broad factors under the common benefit expception that give "the *power* of federal courts to award counsel fees generally", leaving other considerations relevant only "to the exercise of the District Court's discretion on a case-by-case basis." *See* 412 U.S. at 9, 9 n.13, 14-15 (emphasis in original).

This case plainly falls within the parameters set out in *Hall v. Cole,* so that the district court here had power and discretion to award common benefit fees. The "common benefit" in this case can be measured on two levels. First and foremost, petitioner's vindication of his LMRDA free speech and political rights is *ipso facto* a common benefit to his union. *See* 412 U.S. at 8, 9.[16] Second, peti-

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16. In this case, there can be no speculation about the "chill" and threat to the LMRDA rights of all Local 18 members. The district court found that key dissident leaders including petitioner stopped participating actively in union affairs after petitioner's public beating, and that "[t]he dissenters were finally

(Continued on following page)

tioner's prosecution of this suit was a "catalyst" resulting in the removal of the corrupt union leadership that victimized him.[17] The district court did not make any factual findings on petitioner's "catalyst" theory, finding it unnecessary to reach the common benefit argument. A95.

2. The Sixth Circuit holding conflicts with Hall v. Cole.

The Sixth Circuit held that the common benefit exception requires that the fee award "distribute fees in proportion to benefits [received]". A17, 18. The lower court concluded that petitioner's *personal* benefit, his award of compensatory and punitive damages, requires that he bear a proportionately greater portion of the attorney fees than the other union members with whom he shared a *common* benefit, *see* A17-18, so that petitioner's personal benefit removes the district court's discretion to award *any* fees under the common benefit exception.

Footnote continued—

cowed into silence. The freedom and democracy which [the LMRDA, 29 U.S.C.] §411 was enacted to protect has been effectively destroyed in District 2. . . . The defendant unions got what they wanted, the suppression of the dissidents in District 2 of Local 18." A37, 43.

As the Sixth Circuit noted in its 1980 decision, "there are few more direct ways of chilling the exercise of a union member's Landrum-Griffin Act rights than by beating him up." A69.

17. Within six weeks of the district court's February 14, 1977 final judgment, A45-58, the newly elected Business Manager of Local 18 terminated defendant John Frank's appointment as District Representative to District 2 and Frank shortly thereafter resigned his elected Local 18 office of Vice-President. (These facts are established by an affidavit in the record of William Fadel, one of the attorneys for respondent.) Removal of a union officer whose conduct is characterized by oppressive tactics abhorrent to union democracy is of substantial benefit to all union members. *See Davis v. Ampthill Rayon Workers, Inc.*, 446 F. Supp. 681, 687 (E.D. Va. 1978), *aff'd*, 594 F.2d 856 (4th Cir. 1979).

This holding (1) is unprecedented among the federal circuits; (2) misreads and conflicts with *Hall v. Cole;* (3) is based in part on a plain misreading of the *Alyeska* decision; (4) is inconsistent with common benefit decisions in several other circuits; and (5) would eliminate the *Hall v. Cole* distinction between the *existence* of discretion and the *exercise* of that discretion under the common benefit exception.

First, the Sixth Circuit misconstrues the proportionality language in *Mills v. Electric Auto-Lite Co.,* 396 U.S. 375 (1970) and *Hall v. Cole.* The requirement that the fee award "will operate to spread the costs proportionately among" the members of the benefitted class merely means that the "costs" of obtaining the common benefit will be spread evenly across the entire benefitted class. Thus, in a shareholders' derivative action like *Mills,* "the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation. . . ." *Mills v. Electric Auto-Lite Co., supra,* 396 U.S. at 394. In like manner, an attorney fee award against a union in LMRDA actions can be spread evenly among all union members, the benefitted class. *See Hall v. Cole, supra,* 412 U.S. at 8-9.

There will almost always be a personal, non-common benefit obtained by the individual union member in LMRDA suits. The plaintiff union member in *Hall v. Cole,* for example, obtained a personal, non-common benefit, reinstatement to the union, that was greater and in addition to the *common* benefit he shared with all his fellow union members. Yet, this Court made no mention of the plaintiff's personal, non-common benefit as a factor bear-

ing on the *existence* of discretion to award attorney fees. *See* 412 U.S. at 7-9.[18]

The discussion of the common benefit exception in *Alyeska*, cited by the Sixth Circuit, A17, does not support the type of proportionality requirement imposed by the Sixth Circuit in this case. The lower court in *Alyeska* held that an attorney fee award against the defendant Alyeska would not "spread the costs of litigation proportionately" among the class of beneficiaries simply because the beneficiary class was the public in general.[19] *See Alyeska Pipe Line Service Co. v. Wilderness Society, supra*, 421 U.S. at 265 n.39. This is what distinguishes the "private attorney general" rationale for attorney fees, rejected in *Alyeska*, from the common benefit rationale expressly approved in *Alyeska*. *See* 421 U.S. at 257-59, 265 n.39; *Skehan v. Board of Trustees of Bloomsburg State College*,

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18. In *Hall v. Cole*, the Court did not point to any tangible benefit to the union resulting from Hall's vindication of his own free speech rights. The injunctive relief of reinstatement obtained by the plaintiff in *Hall v. Cole* ran only in favor of Hall himself and not other union members. *See* 412 U.S. at 3; *Cole v. Hall*, 462 F.2d 777, 778 (2nd Cir. 1972), *aff'd*, 412 U.S. 1 (1973). Nor did this Court point to any specific, practical results of the lawsuit to the union, or refer to the particular type of relief obtained, in holding that a common benefit existed. *See id.* at 7-9. Rather, the mere vindication by Hall of his own free speech right under the LMRDA "*necessarily* rendered a substantial service to his union as an institution and to all of its members." *Id.* at 8 (emphasis added).

19. *See Wilderness Society v. Morton*, 495 F.2d 1026, 1029 (D.C. Cir. 1974) (*en banc*), *rev'd*, 421 U.S. 240 (1975). The lower court found the benefit bestowed was the vindication of "every citizen's interest in the proper functioning of our system of government." *Id.* at 1029. The defendant Alyeska was a corporation whose shareholders consisted of a consortium of oil companies. *See Alyeska Pipe Line Service Co. v. Wilderness Society, supra*, 421 U.S. 240, 241 n.2. As a result, a fee award against Alyeska would only spread the cost of the suit among several oil companies, with no indication that those costs would ultimately be passed along to the general public as opposed to "selected elements of it". *See id.* at 265 n.39.

538 F.2d 53, 56 (3rd Cir.) (*en banc*), *cert. denied*, 429 U.S. 979 (1976); *Satoskar v. Indiana Real Estate Comm'n*, 517 F.2d 696, 698 (7th Cir.), *cert. denied*, 423 U.S. 928 (1975). Contrary to the Sixth Circuit characterization, the common benefit in this case is not the benefit to "society as a whole" through "general deterrence when the law is enforced." A18 n.13. As in *Hall v. Cole*, the *common* benefit justifying attorney fees inures to the members of the plaintiff's union.

3. The Sixth Circuit holding conflicts with decisions in six other circuits.

The Sixth Circuit's proportionality reasoning is inconsistent not only with the result and reasoning of *Hall v. Cole*, but also with the reasoning and results in several decisions cited with approval by *Hall v. Cole*.[20] The Sixth Circuit *en banc* opinion acknowledged decisions by the Second, Fifth, Eighth, and Ninth Circuits approving a common benefit attorney fee award "in cases where the plaintiff received a damage award", and implied that these cases were inconsistent with its reasoning. A18 n.14. These and other decisions among the circuits conflict with the Sixth Circuit's new proportionality requirement. This is particularly true with the cases in at least two circuits ap-

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20. In *Sands v. Abelli*, 290 F. Supp. 677 (S.D. N.Y. 1968), cited in *Hall v. Cole, supra*, 412 U.S. at 9, 14, the successful LMRDA plaintiff had been awarded compensatory and punitive damages against his union local, 290 F. Supp. at 681, 683, 684, 685, and was also awarded common benefit attorney fees including fees for an appeal. *Id.* at 686.

In *Robins v. Schonfield*, 326 F. Supp. 525 (S.D. N.Y. 1971), cited with approval in *Hall v. Cole, supra*, 412 U.S. at 9, 14, the Court awarded attorney fees under the common benefit rationale to a union member who obtained compensatory damages but no injunctive relief in his successful action claiming retaliatory discipline under Title I of the LMRDA. 326 F. Supp. at 531, 526, 530, 532.

proving the common benefit attorney fees for a plaintiff who received compensatory *and* punitive damages from his union.[21] Similarly, the Sixth Circuit holding conflicts with decisions in at least four other circuits approving common benefit fee awards for plaintiffs obtaining compensatory damages in addition to personal injunctive relief,[22] or obtaining damages only and no injunctive relief of any kind.[23]

The Sixth Circuit's holding that the threshold, *i.e.*, "power", requirements under the *Hall v. Cole* common benefit exception are not met in this case creates confusion and conflicts not only with *Hall v. Cole* itself but also with decisions in at least six other circuits. The Sixth Circuit decision squarely presents an important question concerning the parameters of the common benefit exception, a question this Court should now resolve.

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21. In addition to *Sands v. Abelli, supra, see Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299, 1302, 1306 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (LMRDA case; alternative grounds of common benefit and bad faith exceptions); *Ross v. International Brotherhood of Electrical Workers*, 544 F.2d 1022, 1025 (9th Cir. 1976) (LMRDA case; remanding for determination of damages, including possible punitive damages); *Harrison v. United Transportation Union*, 530 F.2d 558, 564, 559, 563-4 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976) (breach of duty of fair representation, remanding for allowance of trial and appellate fees, citing *Hall v. Cole*).

22. *Maceira v. Pagan*, 698 F.2d 38, 41, 39, 42 (1st Cir. 1983) (LMRDA plaintiffs' preliminary success in litigation led to settlement of reinstatement plus damages; common benefit fee approved, including fees for two successful appeals); *Feltington v. Moving Picture Machine Operators Local 306*, 605 F.2d 1251, 1257, 1258, 1258 n.12 (2nd Cir. 1979), *cert. denied*, 446 U.S. 943 (1980) (LMRDA plaintiff obtained reinstatement, remanding for trial on compensatory damages, holding district court had discretion on remand to award attorney fees).

23. *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 469, 472 (5th Cir. 1981); *Stein v. Mutuel Clerks' Guild of Mass., Inc.*, 560 F.2d 486, 489-90, 492 (1st Cir. 1977); *Bradford v. Textile Workers of America*, 563 F.2d 1138, 1140, 1144 (4th Cir. 1977); *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 384, 385 (8th Cir. 1977) (duty of fair representation).

E. The Sixth Circuit Erroneously Denied Fees Under §1988 By Holding That Petitioner's Civil Rights Claims "Were Not Substantial" When The Fees Were Incurred.

Assuming that the *Maher v. Gagne,* 448 U.S. 122 (1980), "substantiality" test applies to petitioner's civil rights claims, as the Sixth Circuit *en banc* did without deciding, A20,[24] the question is whether the Sixth Circuit erroneously held that petitioner's §§1985(3) and 1986 claims, "were not substantial", A20, given the very liberal meaning of "substantial", and given the state of the law prior to 1980 when petitioner's attorney fees were incurred.

As outlined in the legislative history, the "substantiality" test requires that the civil rights claim be "substantial" within the meaning of *Hagans v. Lavine,* 415 U.S. 528, 538 (1974). *See Maher v. Gagne, supra,* 448 U.S. at 132 n.15. *Hagans* held that

> [a] claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this

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24. *Maher v. Gagne,* 448 U.S. 122 (1980) held that a plaintiff who "prevails on a wholly statutory, non-civil-rights claim pendent to a *substantial* constitutional claim" is entitled to attorney fees under 42 U.S.C. §1988 even though the district court did not reach the merits of the civil rights claim. 448 U.S. at 132, 132 n.15 (emphasis added). At least one circuit has applied the *Maher v. Gagne* "substantiality" test to the civil rights claim of a plaintiff who, like petitioner in this case, loses on the claim at trial but prevails on a non-civil rights claim, and whose cross-appeal on the civil rights claim is left unresolved. *See Williams v. Thomas,* 692 F.2d 1032, 1035, 1036, 1039 (5th Cir.), *cert. denied,* 103 S. Ct. 3115 (1983) (awarding plaintiff trial and appellate attorney fees under §1988).

The Court's language and the legislative history cited in *Maher* indicate that the same rule may apply when the civil rights claim is based upon a statutory rather than constitutional violation. *See Maher v. Gagne, supra,* 448 U.S. at 132, 132 n.15. The first important question presented under §1988 by this case is whether the "substantiality" test, rather than the more demanding test on the merits, is to be applied when the civil rights claim is "statutory" rather than "constitutional".

> court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."

415 U.S. at 538, *quoting Ex parte Poresky*, 290 U.S. 30, 32 (1933).

It can scarcely be said that in 1975, when the district court dismissed petitioner's civil rights claims, A37-38, or in 1980, when the Sixth Circuit refused to decide the issue, A63 n.10, previous decisions of the Supreme Court had "clearly" indicated that a conspiracy to violate a union member's bill of rights under §101 of the Landrum-Griffin Act is not also a conspiracy prohibited by §§1985 (3) and 1986. First, the Supreme Court held in 1980 that the phrase "and laws" as used in 42 U.S.C. §1983, a phrase also used in §1985(3), "broadly encompasses violations of federal statutory as well as constitutional law." *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Second, the discussion in and the mere existence of the Supreme Court's 5-4 decision in *United Brotherhood of Carpenters v. Scott*, 103 S. Ct. 3352 (1983) demonstrates that as late as 1983 such a §1985(3) claim was at least "substantial".[25] Certainly, prior to this 1983 decision a very plausible argument could be made that petitioner's §1985(3) claim had merit.[26] *Cf. United Brotherhood of*

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25. *Scott* reversed a holding by the Fifth Circuit *en banc* that found that a conspiracy to beat construction workers because of their non-union status violated §1985(3). *See* 103 S. Ct. at 3356; A20-21.

26. In 1978, for example, a §1985(3) claim very similar to petitioner's claim in this case was upheld in *Murphy v. Operating Engineers, Local 18*, 99 L.R.R.M. 2074 (N.D. Ohio 1978), *appeal pending*, Case Nos. 82-3702, 82-3747 (6th Cir.). There the district court noted the requirements of *Griffin v. Breckinridge*, 403 U.S. 88 (1971), including the "class based invidiously discriminatory animus" requirement, *id.* at 2124, extensively reviewed the lower federal court decisions, and held respondent Local 18 liable under §1985(3), *id.* at 2124-2126, 2129-30, based upon a conspiracy to deprive a union member of his rights under the LMRDA. *Id.* at 2126.

Carpenters v. Scott, supra, 103 S. Ct. at 3361-69 (Blackmun, J. dissenting).

This Court should take this opportunity to clarify the scope and meaning of the *Maher v. Gagne* doctrine, which involves questions of significant national importance under 42 U.S.C. §1988, and to correct the unduly restrictive approach to §1988 taken by the Sixth Circuit.[27]

CONCLUSION

Petitioner urges the Court to grant this petition, eliminate the circuit conflicts and confusion created by the Sixth Circuit's decision on the bad faith and common benefit exceptions, and resolve the important issues presented concerning 42 U.S.C. §1988.

Respectfully submitted,

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27. The Sixth Circuit's interpretation of *Smith v. Robinson,* 104 S. Ct. 3457, 3468 n.12 (1984) itself raises a significant question under §1988. *Smith,* of course, is distinguishable from this and most other §1988 cases, in that the successful plaintiff there did not even plead his pertinent civil rights claims until *after* he had already prevailed on the non-fee claims. This is why the Court in *Smith* held that the plaintiff's civil rights claims "had nothing to do with [the plaintiff's] success". *See id.* at 3468 n.12. To apply that reasoning as the Sixth Circuit would, *see* A21, whenever a plaintiff obtains all his requested relief except attorney fees on non-civil rights claims, would obliterate *Maher v. Gagne* and the "substantiality" test entirely.

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No. 84-1043

In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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APPENDIX

EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 1, 1984)

No. 82-3370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. SHIMMAN,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Defendant-Appellant.

ON APPEAL from the United States District Court
For the Northern District of Ohio,
Western Division.

Before: LIVELY, *Chief Judge;* EDWARDS, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, CONTIE, KRUPANSKY, and WELLFORD, *Circuit Judges.**

KENNEDY, *J.*, delivered the opinion of the Court, in which LIVELY, ENGEL, MERRITT, MARTIN, CONTIE, KRUPANSKY and WELLFORD, *JJ.*, joined. EDWARDS (p. 23) and

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*Nathaniel R. Jones, Circuit Judge, took no part in the consideration or decision of this case.

KEITH, *JJ.*, (p. 24-25) delivered separate concurring opinions.

KENNEDY, *Circuit Judge.* This appeal presents the question of whether Shimman could be awarded his attorney fees incurred during an earlier appeal in this case. We hold that there was no basis for the award and reverse.

I. Introduction

In 1973 John C. Shimman brought suit against the International Union of Operating Engineers, Local 18 ("Local 18"); the International Union of Operating Engineers, AFL-CIO; John Frank, an officer of Local 18; and Terry and James Grothaus, members of Local 18. The complaint alleged violations of § 411(a) of the Labor-Management Reporting Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. § 411(a); 42 U.S.C. §§ 1985 and 1986; and Ohio common law of assault and battery.

A bench trial was held in the District Court, bifurcated between issues of liability and damages. The essential facts developed at trial were that Terry and James Grothaus, at Frank's direction, assaulted Shimman at a district union meeting pursuant to a plan to intimidate and suppress the dissident movement in the union. Shimman was a dissident union member opposed to the union leadership.[1] The District Court found all defendants liable on the LMRDA and Ohio common law counts, and dismissed the counts under 42 U.S.C. §§ 1985 and 1986 as to all defendants. The District Court then awarded Shimman compensatory damages, attorney fees, and substantial punitive damages against all defendants. On appeal, a panel of this Court reversed the judgment against the International Union and

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1. The facts underlying this litigation are more fully described at *Shimman v. Frank*, 625 F.2d 80, 83-88 (6th Cir. 1980).

reduced the amount of punitive damages assessed against the other defendants, but otherwise affirmed the District Court.[2]

Shimman then applied to the District Court for additional attorney fees for work done on the appeal. The defendants contested the District Court's authority to award attorney fees for the appeal, but did not question the amount sought. The District Court awarded Shimman $56,178.00 in attorney fees for the appeal, holding that such an award was authorized because of defendants' bad faith and malicious conduct. Defendant Local 18 appealed the award, which was affirmed by a divided panel of this Court. *Shimman v. International Union of Operating Engineers, Local 18,* 719 F.2d 879 (6th Cir. 1983). On December 5, 1983 this Court vacated the panel's opinion and granted rehearing en banc.

Shimman contends that the District Court's award of attorney fees incurred during the earlier appeal may be justified under any of four bases: (1) the "bad faith" exception to the American Rule that attorney fees are generally not allowed; (2) the "common benefit" exception to the American Rule; (3) the Civil Rights Attorney Fee Awards Act of 1976, 42 U.S.C. § 1988; and (4) Ohio common law, which allows attorney fees in assault and battery cases. We examine each of these rationales in turn to see if they support the District Court's award.

II. Bad Faith

The District Court held that it had authority to award attorney fees incurred at trial because it found that its

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2. This appeal was reported as *Shimman v. Frank,* 625 F.2d 80 (6th Cir. 1980). The Court did not find it necessary to reach the crossappeal regarding liability under 42 U.S.C. §§ 1985 and 1986. *See Shimman v. Frank,* 625 F.2d at 86 n.10.

"findings and conclusions upon the liability issue make abundantly clear that all of the defendants here acted in bad faith, vexatiously, maliciously, wantonly, wilfully, and entirely for oppressive reasons. They could not have innocently misunderstood that the LMRDA prohibited them from doing what they did." After the 1980 appeal, the District Court then held that the same findings of malice and bad faith supported an award of attorney fees for the appeal. The District Court thus did not reach the three other grounds proposed by Shimman. This Court must therefore decide whether an award of appellate attorney fees is allowable where the defendants' acts giving rise to the underlying LMRDA cause of action were malicious and in bad faith.[3]

It has long been the general rule in the United States that a prevailing party may not ordinarily recover attorneys fees in the absence of a statute or enforceable contract providing for a fee award. This "American Rule" regarding attorney fees was adopted by the Supreme Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796). The American Rule applies to a claim for compensatory damages expressly created by a federal statute. *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417

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3. Shimman suggests that, because in the 1980 appeal a panel of this Court upheld an award for fees incurred at trial based in part on the same bad faith relied upon here, the law of the case doctrine precludes this Court from considering whether the bad faith exception applies to the type of bad faith found in the present case; leaving only the question of "whether the bad faith exception permits attorney fees to be awarded for appeals as well as for the trial work." Supplemental Brief of Appellee at 15. The law of the case doctrine, however, does not impair the power of an en banc court to overrule any panel decision. *See Van Gemert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978) (en banc), *aff'd on other grounds*, 444 U.S. 472 (1980); *In Re Central R. Co.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1131 (1974). For further discussion of the 1980 panel opinion, see note 11, *infra*.

U.S. 116 (1974). The American Rule's failure to fully compensate an injured party is justified by the rationale that "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The general American Rule has been reaffirmed numerous times by the Supreme Court. *See, e.g., Hensley v. Eckerhart*, 103 S. Ct. 1933 (1983); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

The "bad faith" exception to the American Rule allows attorney fees in certain exceptional cases where the opposing party has acted in bad faith. The earliest Supreme Court case cited for this exception is *Vaughan v. Atkinson*, 369 U.S. 527 (1962). *Vaughan* was an admiralty suit by a seaman against shipowners for damages for failure to pay maintenance and cure while the seaman was recovering from an illness contracted aboard ship. Under admiralty law, the shipowners had a duty to provide the seaman with maintenance and cure while convalescing, and if they failed to provide maintenance and cure the shipowners were liable for consequential damages arising from their failure to pay. The Supreme Court allowed the seaman attorney fees incurred in his suit to recover maintenance as an item of damages for the shipowners' failure to pay maintenance. The Court reasoned that the shipowners:

> were callous in their attitude, making no investigation of [the seaman's] claim and by their silence neither

> admitting nor denying it. As a result of that recalcitrance, [the seaman] was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent.

369 U.S. at 530-31. In the first Supreme Court case citing *Vaughan* as establishing an exception to the American Rule, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), the Court indicated that *Vaughan* was limited to calculating compensatory damages in admiralty cases. One year after Fleischmann and six years after *Vaughan*, however, the Supreme Court noted that "it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 n.4 (1968) (quoting 6 Moore's Federal Practice 1352 (1966 ed.)). In more recent cases, the Supreme Court has nonetheless cited *Vaughan* as the precursor of the broader principle espoused in *Newman*. *See Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717, 721 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975); *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973).

Although the bad faith exception is firmly established in Supreme Court precedent, its limits are not precisely defined. In the present case, the only bad faith found to exist was that inherent in the acts giving rise to the substantive claim. We are therefore faced with the question of whether the bad faith exception covers this type of bad faith.

The bad faith considered by courts construing this exception generally falls within one of three categories: (1) bad faith occurring during the course of the litigation; (2) bad faith in bringing an action or in causing an action to be brought; and (3) bad faith in the acts giving rise to the substantive claim.[4] Bad faith in the conduct of the litigation, resulting in a fee award as a sanction for abuse of the judicial process, is the most familiar type of bad faith under which fees are awarded.[5] Courts have also consistently recognized attorney fees as awardable where a meritless claim or defense is maintained in bad faith.[6] Care must be taken to distinguish a defendant's bad faith in necessitating that an action be filed or in maintaining a defense from a defendant's bad faith in the acts giving rise to the claim. This distinction may

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4. In *Straub v. Vaisman & Co.*, 540 F.2d 591, 600 (3d Cir. 1976), the Third Circuit used essentially these three categories to classify the cases, although it denominated the second category "vexatious conduct which occurred before litigation actually commenced." This language seems inappropriate, since conduct in both the second and third categories would normally occur before litigation commences.

5. Cases considering application of the bad faith exception to this type of bad faith include *Caspe v. Aaacon Auto Transport*, 658 F.2d 613, 617-18 (8th Cir. 1981); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 559-60 (5th Cir. 1981); *Browning Debenture Holders' Committee v. Dasa Corp.*, 560 F.2d 1078, 1087-89 (2d Cir. 1977); *Adams v. Carlson*, 521 F.2d 168, 170 (7th Cir. 1975); *Townsend v. Edelman*, 518 F.2d 116, 123-24 (7th Cir. 1975); *Lichtenstein v. Lichtenstein*, 481 F.2d 682 (3d Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); *First National Bank v. Dunham*, 471 F.2d 712, 713 (8th Cir. 1973); and *Bell v. School Board*, 321 F.2d 494 (4th Cir. 1963).

6. Cases in which defendants have been awarded attorney fees in frivolous or vexatious lawsuits brought against them in bad faith include *Copeland v. Martinez*, 603 F.2d 981 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980) and *Guardian Trust Co. v. Kansas City Southern R. Co.*, 28 F.2d 233 (8th Cir. 1928). *See also Lipsig v. National Student Marketing Corp.*, 663 F.2d 178 (D.C. Cir. 1980) (plaintiff awarded fees for defending frivolous

(Continued on following page)

be seen in the decision in *Vaughan v. Atkinson*, 369 U.S. 527 (1962), which first established the bad faith exception. In *Vaughan* the defendants were not found to have acted in bad faith by causing the plaintiff's illness; in fact, the trial court found the defendants not negligent. *Vaughan v. Atkinson*, 291 F.2d 813, 813 (4th Cir. 1961), *rev'd on other grounds*, 369 U.S. 527 (1962). Instead, the Supreme Court allowed an attorney fee award because defendants had callously refused to pay maintenance and cure that "was plainly owed [plaintiff] under laws that are centuries old." 369 U.S. at 531.

The cases allowing attorney fees where there is bad faith in the acts giving rise to the substantive claim are generally not as clear as those that have considered bad faith of the first two types.[7] In *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951), the court approved an attorney fee award because of the defendant's "oppressive conduct" giving rise to the claim. Rolax was a suit by minority railroad firemen seeking an injunction and damages in a challenge to a discriminatory collective bargaining agreement. The court relied on the fact that the damages sought were less than the amount of attorney

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Footnote continued—

counterclaim). *Cf. Miracle Mile Associates v. City of Rochester*, 617 F.2d 18 (2d Cir. 1980) (fee award reversed; claim not frivolous or in bad faith just because without merit). Similarly, maintaining a frivolous defense in bad faith, forcing plaintiff to go to court, may result in a fee award for the plaintiff. *See Carter v. Noble*, 526 F.2d 677 (5th Cir. 1976); *Fairley v. Patterson*, 493 F.2d 598 (5th Cir. 1974); *Monroe v. Board of Commissioners*, 453 F.2d 259 (6th Cir.), *cert denied*, 406 U.S. 945 (1972); *McEnteggart v. Cataldo*, 451 F.2d 1109 (1st Cir. 1971), *cert. denied*, 408 U.S. 943 (1973).

7. *But see Richardson v. Communication Workers*, 530 F.2d 126 (8th Cir.) (award of attorney fees clearly upheld on the basis of the union's bad faith breach of duty of fair representation, which gave rise to the underlying claim), *cert. denied*, 429 U.S. 824 (1976).

fees incurred and were relatively unimportant compared to the injunctive relief, which would benefit all minority firemen employed by the railroad. The fee award in *Rolax* seems to be more properly based on the common benefit exception, discussed in part III *infra*.[8] In *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983), the Ninth Circuit remanded a claim for attorney fees for a determination of whether the defendant had acted in bad faith either before or during the litigation. This implies that the court would allow attorney fees based on bad faith in the underlying acts. The defendant's position had previously been found substantially justified and so the only possible pre-litigation bad faith was in the underlying acts. *Schlein v. Smith*, 160 F.2d 22 (D.C. Cir. 1947), often cited for the bad faith exception, involved a common-law fraud claim. The court approved an attorney fee award as a part of punitive damages allowable in willful fraud cases. *Schlein* is therefore not applicable to an attorney fee award arising from a federal statutory claim for which punitive damages are inappropriate.

To allow an award of attorney fees based on bad faith in the act underlying the substantive claim would not be consistent with the rationale behind the American Rule regarding attorney fees. By refusing to penalize a litigant whose judgment concerning the merits of his position turns out to be in error, the American Rule protects the right to go to court and litigate a non-frivolous claim or defense. The unsuccessful litigant is not penalized even when an injured party whose claim is upheld is not made completely whole because of the cost of litigation. The unsuccessful

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8. Since the "common benefit" exception was not recognized as a distinct exception until the Supreme Court's decisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall v. Cole*, 412 U.S. 1 (1975), that terminology was not available to the court in *Rolax*.

litigant may be penalized, however, if the litigation was not maintained in good faith. In such a case, the successful party has ordinarily suffered two wrongs: one in the events giving rise to the litigation, and another in the wrongful conduct or instigation of the litigation. Attorney fees incurred while curing the original wrong are not compensable because they represent the cost of maintaining open access to an equitable system of justice. That policy is not served, however, by denying fee awards when the justice system has been wrongfully used. There is no need to maintain open access for those who abuse the system. The bad faith exception applies when the need for open access is absent. *See Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (2d Cir. 1973) ("Assessment of counsel fees under such circumstances in no way conflicts with the primary justification for the rule against the shifting of counsel fees, namely, that the defendant should not be discouraged from fairly contesting the plaintiff's claims.").[9]

The rationale behind the American Rule remains intact when there is bad faith in the event underlying the substantive claim. A person who harms another in bad faith is nonetheless entitled to defend a lawsuit in good faith.

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9. Fees awarded under the bad faith exception are punitive in nature, but are designed to punish the abuse of the judicial process rather than the original wrong. The effect of a fee award based on bad faith in the initial wrongdoing would be to punish that conduct. Courts have held that attorney fees based on bad faith securities law violations are not allowable because the securities laws expressly deny recovery of punitive damages. *See Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981); *Straub v. Vaisman & Co.*, 540 F.2d 591 (3d Cir. 1976). It is not entirely clear whether punitive damages are allowable in LMRDA § 412 suits. See discussion in *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980). If punitive damages are not allowable, this would provide an alternative rationale for disallowing the attorney fee award in this case. We need not resolve this question in the present case, however.

"A party is not to be penalized for maintaining an aggressive litigation posture . . . ." *Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 180-81 (D.C. Cir. 1980).

The development of the bad faith exception supports the view that the bad faith exception does not apply where there is no bad faith after the original claim arises. In *Vaughan*, attorney fees were awarded to recompense not the original injury, but the secondary injury resulting from the failure to provide maintenance and cure that was indisputably owed.

Shimman argues that the attorney fee award in this case was justified by the Supreme Court's statement in *Hall v. Cole*, 412 U.S. 1, 15 (1973) that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Hall v. Cole*, however, should not be read as expanding the bad faith exception to the American Rule.

The Court in *Hall* was not presented with the question of whether the bad faith exception applied to bad faith in the acts giving rise to the underlying claim. The question before the Court in *Hall* was whether the "common fund" exception could be extended to a case where there was no common fund but a common benefit of injunctive relief. There was no finding in *Hall* that the defendants had acted in bad faith.

More importantly, the statement in *Hall* relied on by Shimman should not be read as referring to the bad faith exception at all. It is critical to understand the context in which the statement on bad faith was made. The Court found that the plaintiff in *Hall* was entitled to fees under a common benefit theory. Defendants were arguing that since the common benefit theory is an equitable doctrine, the district court had abused its discretion in award-

ing such fees where it had found that defendants acted in good faith in expelling plaintiff and plaintiff had arguably been found to have acted in bad faith. Answering those arguments, the Court said:

> Petitioners also contend that the award of attorneys' fees in this case was improper because the District Court, in denying respondent's claim for punitive damages, found that "the defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers . . . ." 462 F.2d, at 780. Moreover, although the presence of "bad faith" is essential to "fee-shifting" under a "punishment" rationale, neither the presence nor absence of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff under the "common benefit" rationale recognized in *Mills* and operative today.

412 U.S. at 15. The Court's discussion of bad faith was entirely within the context of determining whether the relative equities of the parties' positions precluded application of the equitable common benefit doctrine. The Court did mention the bad faith exception earlier in the *Hall* opinion:

> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice ¶ 54.77[2], p. 1709 (2d ed. 1972).

412 U.S. at 5. *Moore's Federal Practice* precedes the quoted words with the statement, "where an unfounded action or defense is brought or maintained . . . ." It thus is clear that *Hall* did not extend the bad faith exception.[10]

In *Richardson v. Communication Workers*, 530 F.2d 126, 132 (8th Cir. 1976), the Eighth Circuit cited *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), as establishing an exception to the American Rule "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " The court then found that the defendant unions had acted in bad faith in breaching their duty of fair representation, and held that "the Unions' bad faith comes within the bad faith exception noted in *Alyeska*." 530 F.2d at 133. The Supreme Court's opinion in *Alyeska* merely cites *F. D. Rich Co.* and *Vaughan*

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10. In *Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976), a suit challenging Kentucky's delay in processing welfare applications, the district court had awarded attorney fees under a "private attorney general" theory and had not decided whether fees were also justified under a bad faith theory. This Court reversed the award of attorney fees under the "private attorney general" theory and remanded for consideration of whether fees were allowable on the basis of bad faith. The Court cited *Hall v. Cole* for the proposition that the " 'bad faith' which justifies the award of attorneys' fees may be demonstrated in the conduct which necessitated the action or in conduct occurring during the course of the action." 538 F.2d at 1245 n.9. The Court also noted that on remand an award of attorney fees based on bad faith could be "justified by Appellants' conduct either in the processing of applications and the award of benefits or in the defense of the law suit." 538 F.2d at 1246 n.12. Under the facts in *Huecker*, the reference to bad faith "in the processing of applications and the award of benefits" could only refer to bad faith in the conduct giving rise to the underlying claim. These statements in *Huecker* are dicta, since the district court had not awarded fees under a bad faith theory, and these dicta are disapproved to the extent inconsistent with our holding today. We also recognize that our interpretation of *Hall v. Cole* is inconsistent, at least implicitly, with the Ninth Circuit's decisions in *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983) and *Doghera v. Safeway Stores, Inc.*, 679 F.2d 1293 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982).

as establishing the bad faith exception. We do not agree with the Eighth Circuit that in *Alyeska* the Court intended to expand the bad faith exception to include bad faith in the conduct giving rise to the underlying claim.

We therefore hold that the bad faith exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim.

The District Court's award of attorney fees, based on this type of bad faith, may therefore not be justified by the bad faith exception.[11] We also note that the record would not support a finding of bad faith of a type that would justify a fee award. There is no indication that the defense of this lawsuit was conducted in bad faith; nor is this a case where the defendant contumaciously refused to allow the plaintiff what was plainly owed, thus forcing the plaintiff to go to court. Although it may have been plain that Shimman's rights were infringed, questions as to which defendants were liable and for what amounts were very much in doubt at least through the 1980 appeal. In fact, defendants were partially successful both in the trial and in the 1980 appeal.

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11. In the earlier appeal in this case, *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980), a panel of this Court affirmed the District Court's award of attorney fees incurred at trial level. The panel noted three possible rationales to support the fee award: (1) bad faith under *Hall v. Cole;* (2) bad faith under Ohio law allowing attorney fee awards in assault and battery cases; and (3) common benefit under *Hall v. Cole*, 625 F.2d at 100-01. The panel held that the fee award was supported by defendants' malicious conduct, and did not reach the common benefit theory. Ohio law was clearly sufficient to support the award of attorney fees incurred at trial. *See* part V *infra*. The panel's decision in *Shimman v. Frank* is overruled to the extent that it purported to rely on the bad faith exception under federal law to support the award of attorney fees.

The attorney fee award is therefore not supportable under the bad faith exception. We next turn to the other rationales proposed by Shimman as support for the fee award.

III. Common Benefit

Although the District Court did not reach the question, Shimman also contends that the award of attorney fees is supported by the "common benefit" exception to the American Rule regarding attorney fees.[12] The common benefit exception is an equitable exception to the American Rule which developed as an extension of the "common fund" exception. *Hall v. Cole*, 412 U.S. 1, 5-6 n.7 (1973). The common fund exception allows an award of fees to a plaintiff whose suit creates, enlarges, or protects a fund shared by members of a class. *See, e.g., Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Trustees of the Internal Improvement Fund v. Greenough*, 105 U.S. 527 (1882).

In *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Supreme Court held that the rationale of the common fund exception extended to a situation where no monetary fund was at stake. *Mills* was a derivative suit brought by shareholders in a corporation to set aside an unlawful merger of their corporation with another. The Court allowed a fee award to the successful plaintiffs, reasoning that the common fund exception allows fees

> where a plaintiff has successfully maintained a suit, usually on behalf of a class, that benefits a group of

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12. This question was also not reached by the panel of this Court in the 1980 appeal. *See Shimman v. Frank*, 625 F.2d 80, 100-01 (6th Cir. 1980).

> others in the same manner as himself. . . . To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense.

396 U.S. at 392. This rationale was applied to a Title I LMRDA case in *Hall v. Cole*, 412 U.S. 1 (1973). There the plaintiff obtained injunctive relief against the union for violating the free speech provisions of the LMRDA. The Supreme Court found the award of attorney fees governed by the rationale of *Mills* because the plaintiff "necessarily rendered a substantial service to his union as an institution and to all of its members . . . [by] dispel[ling] the 'chill' cast upon the rights of others." 412 U.S. at 8.

Although in the present case Shimman was awarded compensatory and punitive damages for personal injuries rather than injunctive relief, Shimman argues that he has rendered a substantial benefit to the union's members by in effect ending oppression of dissident members and restoring union democracy. The District Court did not enjoin further oppression, but Shimman alleges that his suit was a "catalyst" leading to change in the union leadership. Whether or not this constitutes a substantial benefit to the union membership, however, the rationale of the common benefit exception does not apply to this case.

In *Mills* the Supreme Court extended the common fund exception to litigation that created a common benefit, whether a monetary fund or a less tangible benefit. The present litigation did create a large monetary fund composed of compensatory and punitive damages. This fund, however, is not held in common but directly benefits only

Shimman. *Mills* and *Hall* did not change the requirement that the benefit be received in common by those against whom the fee award operates.

Shimman's damage award was not a common benefit, but he claims that the effect of his suit was to produce the additional, common benefit of restoring union democracy. An incidental benefit such as this will not justify a fee award, however, in light of the requirement that the fee award operate so as to impose the burden in proportion to the benefits received. In *Mills* the Court held an attorney fee award proper:

> in cases where the litigation has conferred a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs *proportionately* among them.

396 U.S. at 393-94 (emphasis added). *See also Hall v. Cole,* 412 U.S. at 5. In *Wilderness Society v. Morton,* 495 F.2d 1026, 1029 (D.D.C.) (en banc), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), the court held that "imposing attorneys' fees on Alyeska will not operate to spread the costs of litigation proportionately among these beneficiaries, the key requirement of the 'common benefit' theory." The Supreme Court in *Alyeska* upheld the court of appeals on this point. 421 U.S. at 245 n.14. Shimman received an award, as modified on appeal, of $107,067.99 in compensatory damages and $145,000.00 in punitive damages, yet if the fee award were upheld he would pay no greater portion of the fees than any other union mem-

ber who benefited only incidentally.[13] The fee award would not distribute fees in proportion to benefits.[14]

This is clearly not a case where the plaintiff "benefits a group of others in the same manner as himself." *Mills*, 396 U.S. at 392. Shimman obtained redress for personal injuries not shared by other union members. The purpose of the common benefit exception is to shift the costs of litigation to "the class that benefited from them and that would have had to pay them had it brought the suit." *Hall v. Cole*, 412 U.S. at 7; *Mills*, 396 U.S. at 397. Other union members could not have brought suit to redress Shimman's personal injuries.

Limited exceptions to the American Rule have been sanctioned "when overriding considerations of justice seemed to compel such a result." *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

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13. Since there was no injunction in this case, the benefits received by other union members were achieved not by direct operation of the judgment, but rather were the result of a realization that the union would have to reform itself or risk exposure to further liability. Society as a whole always benefits through general deterrence when the law is enforced. Allowing a fee award based on such benefits, however, would come close to accepting the "private attorney general" rationale, which was rejected by the Supreme Court in *Alyeska*. The common benefit theory should not be allowed to merge into the private attorney general approach. *Satoskar v. Indiana Real Estate Commission*, 517 F.2d 696 (7th Cir.), *cert. denied*, 422 U.S. 928 (1975).

14. Several courts have found an award of attorney fees appropriate in cases where the plaintiff received a damage award. *See Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980); *Rosario v. Amalgamated Ladies Garment Cutters' Union Local 10*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (8th Cir. 1977); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976). *In Rosario* and *McDonald*, plaintiffs obtained an injunction in addition to damages. None of these decisions contain any discussion of the proportionality language in *Mills*, *Hall*, and *Alyeska*.

Union members here were not enriched unjustly at Shimman's expense. *See Mills,* 396 U.S. at 392; *Hall,* 412 U.S. at 6. Overriding considerations of justice do not compel an appellate fee award to a plaintiff awarded punitive damages well in excess of the fees sought.

This is not a proper case for an award of attorney fees under the common benefit theory. The District Court's award can not be justified on that basis.

IV. Section 1988

In counts II and III of his complaint, Shimman alleged violations of 42 U.S.C. §§ 1985(3) and 1986. These counts were dismissed by the District Court, and the panel of this Court that heard the 1980 appeal did not reach Shimman's cross-appeal of that dismissal because recovery on those counts would have been duplicative. *See Shimman v. Frank,* 625 F.2d 80, 86 n.10 (6th Cir. 1980). Shimman now argues that he has nonetheless prevailed in an "action or proceeding to enforce" sections 1985 and 1986, and thus that the award of attorney fees incurred on appeal is allowed by 42 U.S.C. § 1988.

In *Maher v. Gagne,* 448 U.S. 122, 130-33 (1980), the Supreme Court held that an attorney fee award is allowed under § 1988, and thus not barred by the eleventh amendment, "in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim" whether or not the plaintiff actually prevailed on the civil rights claim. In *Seals v. Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977) (citing H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 4 n.7 (1976)), this Court held that § 1988 allowed an attorney fee award when plaintiff prevailed on a state law claim pendent to a substantial federal civil rights claim that was left un-

decided. Citing *Williams v. Thomas,* 692 F.2d 1032 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 3115 (1983), Shimman argues that the same rationale applies where the defendant prevails on the civil rights claim at trial but the issue is left unresolved on appeal. We need not decide this question, however, since Shimman's claims under 42 U.S.C. §§ 1985 and 1986 were not substantial.

Shimman's civil rights claims, as explained in Shimman's Memorandum of Law in Opposition to Defendants' Motions to Dismiss, are based on the theory that defendants conspired to deprive the class consisting of union members opposed to the incumbent union leadership of the equal protection of the laws by violating the LMRDA. Shimman argues that under the rationale of *Maine v. Thiboutot,* 448 U.S. 1 (1980), the phrase "the laws" in 42 U.S.C. § 1985(3) can include federal statutory law as well as the Constitution. It is clear, however, that Shimman has not alleged or proven the kind of discriminatory intent necessary to support a § 1985(3) violation.[15] In *Griffin v. Breckinridge,* 403 U.S. 88, 102 (1971), the Supreme Court held that "[t]he language [in § 1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (Emphasis in original; footnote omitted.) The Supreme Court recently applied this standard in a labor union context in *United Brotherhood of Carpenters v. Scott,* 103 S. Ct. 3352 (1983). In *Scott* the plaintiffs had claimed that they were beaten by defendants in the course of a violent campaign against

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15. Since the § 1986 claim is dependent on the § 1985(3) claim, see *Mollnow v. Carlton,* 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied,* 104 S. Ct. 1595 (1984); *Williams v. St. Joseph Hospital,* 629 F.2d 448, 452 (7th Cir. 1980), we need not discuss it separately.

non-union workers at a particular construction site. The Court first noted that it was "a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause," 103 S. Ct. at 3359, and then held that § 1985(3) did not reach conspiracies motivated by "anti-union, anti-nonunion, or anti-employer biases," 103 S. Ct. at 3361. If § 1985(3) does not reach animus against non-union workers, it certainly does not reach animus one union faction holds for another. Even without the assistance of *Scott*, Shimman's § 1985(3) claim was clearly foreclosed by *Griffin*. Discrimination against the "class" of dissenting union members is no more "invidious" than would be discrimination against any arbitrarily-chosen group of people whose rights may have been violated.

Shimman's civil rights claims were insubstantial, and his suit was not an "action or proceeding to enforce" §§ 1985 or 1986. The award of attorney fees is therefore not supported by 42 U.S.C. § 1988.[16]

Even if Shimman's civil rights claims were substantial, it appears that he would not be entitled to attorney fees under § 1988. Shimman's §§ 1985 & 1986 claims are entirely dependent on his LMRDA claim. Shimman could not have won on the §§ 1985 & 1986 claims unless he also won on the LMRDA claim, and if he had won on both he would not have been entitled to any additional relief by virtue of the civil rights claims. In any event, therefore, the civil rights claims could have had nothing to do with the success of Shimman's suit. In *Smith v. Robinson*, 52

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16. Since 42 U.S.C. § 1988 does not support any award of fees in this case, we need not decide whether *Buian v. Baughard*, 687 F.2d 859 (6th Cir. 1982) forecloses the availability under § 1988 of fees incurred in an appeal where neither party was awarded costs.

U.S.L.W. 5179, 5184 n.12 (U.S. July 5, 1984), the Supreme Court noted that "where it is clear that the claims that provide for attorney's fees had nothing to do with a plaintiff's success, *Hensley v. Eckerhart,* [103 S. Ct. 1933], requires that fees not be awarded on the basis of those claims."

V. Ohio Law

Finally, Shimman argues that the appellate fee award may be affirmed under Ohio law concerning the pendent state assault and battery claim.[17] Ohio law allows attorney fees to successful plaintiffs in assault and battery cases, or in any case in which punitive damages are allowable. *E.g., Roberts v. Mason,* 10 Ohio St. 277 (1859); *Columbus Finance, Inc. v. Howard,* 42 Ohio St. 2d 178 (1975); *Ranghorst v. Riethmiller,* 52 Ohio App. 2d 137 (1977). An award of punitive damages and attorney fees incurred at trial was affirmed as modified in the 1980 appeal in this case and is not challenged here. *See Shimman v. Frank,* 625 F.2d 80 (6th Cir. 1980). The difficult question is whether a separate award of fees is allowable under Ohio law for attorneys' services on appeal. We are cited to no Ohio case and have been unable to find one in which attorney fees on appeal were awarded or discussed in a tort action.[18]

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17. Federal courts must generally apply state law regarding attorney fees to a state law claim pendent to a federal claim. *See Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 259 n.31 (1975).

18. In *In re Estate of Marker,* 33 Ohio L. Abst. 209, 210, *aff'd on other grounds,* 157 Ohio St. 89 (1940), a suit against administrators of an estate, the Ohio Court of Appeals seemed to suggest that an attorney fee award could include work done on appeal. *Marker* was a common fund case, however, and not a tort case allowing for punitive damages. *Marker* is thus of no assistance when considering attorney fees in willful tort cases, which are based on an entirely different rationale.

Support for the appellate fee award cannot be obtained by examining the rationale behind the Ohio rule. It is unclear whether attorney fees in such cases are considered compensatory or punitive damages. Indeed, the Ohio Supreme Court without clarifying the matter has acknowledged that its decisions on that point are in conflict. *See Sorin v. Board of Education*, 46 Ohio St. 2d 177, 181 & nn.2, 3 (1976).[19] However, whatever their basis, the manner in which attorney fees are to be awarded in such cases would appear to preclude a separate award for appellate fees. In a jury trial an award of attorney fees in such cases is made by the jury as part of their verdict:

> [B]ut in cases where the act complained of is tainted by fraud, or involves an ingredient of malice, or insult, the jury, which has power to punish, has necessarily the right to include the consideration of proper and reasonable counsel fees in their estimate of damages.

Roberts v. Mason, 10 Ohio St. 278, 283 (1859). *See also United Power Co. v. Matheny*, 81 Ohio St. 204 (1909); *Finney v. Smith*, 31 Ohio St. 529 (1877); *Hopping v. Sullivan*, 16 Ohio L. Abst. 151 (1934); *Fitzgerald v. Rinebold*, 12 Ohio L. Rep. 199 (1914); *August v. Finnerty*, 10 Ohio C.C. (n.s.) 433 (1908). Moreover, no evidence is permitted concerning the amount of a reasonable attorney fee. In *Roberts*, 10 Ohio St. at 283, the Ohio Supreme Court noted: "No evidence in this case appears to have been given

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19. Of the three cases cited in *Sorin* for the proposition that attorney fees are punitive damages, only one supports that proposition, and only by inference. *See Smithhisler v. Dutter*, 157 Ohio St. 454 (1952). *Cf. Columbus Finance v. Howard*, 42 Ohio St. 2d 178 (1975); *Peckham Iron Co. v. Harper*, 41 Ohio St. 100 (1884). The majority of Ohio cases call attorney fees compensatory. See list at 30 Ohio Juris. 3d *Damages* § 114 n.5. However, we must accept the Ohio Supreme Court's characterization of the question as unsettled.

to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received." *See also Stevenson v. Morris*, 37 Ohio St. 10, 22 (1881) ("Counsel fees are . . . to be allowed . . . only as an item of estimated general damages to be included in the discretion of the jury."); *Hudson v. Voigt*, 15 Ohio C.C. 391 (1898).

The instant case was tried to the court. However, the judge would be bound to apply the same rule as to damages as the jury—to include as part of the general damages an amount for attorney fees without evidence as to what fees were actually charged or reasonable. This procedure was not followed with respect to the award of appellate fees in this case, and is inconsistent with the possibility of any award of appellate attorney fees whatsoever.

Gates v. City of Toledo, 57 Ohio St. 105 (1897), was a suit for attorney fees under a hold harmless clause in a contract. In dicta the Ohio Supreme Court noted that:

> in the cases upon tort where counsel fees have been considered, although treated as part of plaintiff's compensation, they relate to such probable expense of this character *as would be incurred in the case on trial*, and which would be present in the mind of the jury, but that no proof was allowed as to their extent or value.

57 Ohio St. at 112 (emphasis added). Although *Gates* was not a tort case, and the possibility of appellate fees was not before the court, this language indicates the nature of fee awards under Ohio tort law.

In the absence of any Ohio decision awarding fees incurred on appeal, we are reluctant to expand the Ohio

rule allowing fees in certain tort cases beyond the circumstances considered by Ohio precedent. Ohio generally follows the American Rule disallowing attorney fees. *Sorin v. Board of Education,* 46 Ohio St. 2d 177, 179 (1976). In *Sorin,* the Ohio Supreme Court expressed reluctance to expand the Ohio tort rule to include statutory violation cases because "any departure from such a deeply-rooted policy as the exclusion of attorney fees as costs is a matter of legislative concern." 46 Ohio St. 2d at 179-80. Any departure from the American Rule by allowing appellate fees must similarly be left to Ohio, not the federal courts.

The award of appellate attorney fees in this case is not supported by Ohio law.

VI. Conclusion

The attorney fee award in this case is not justified by any of the theories proposed by Shimman. The District Court had no basis on which to award fees for work done on appeal. Accordingly, the judgment is reversed and the case is remanded to the District Court, with directions to enter an order denying attorney fees.

EDWARDS, *Circuit Judge,* concurring. I concur in the result set forth in the en banc majority opinion and in the opinion to the extent that it relies on the following two reasons: (1) this Court remanded this case to the District Court in *Shimman v. Frank,* 625 F.2d 80 (6th Cir. 1980) (after modifying and affirming the District Court judgment) specifically ordering "each side will bear its own costs." There is no justification in this record for the District Court faced with this instructon to order Defendants to pay Plaintiff's attorney's fees. (2) The award of attorney's fees in this case is also barred by *Alyeska Pipeline Services Co. v. Wilderness Society,* 421

U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), since Plaintiff's fee claims do not fit within any of the exceptions to the American Rule recognized in *Alyeska*.

KEITH, *Circuit Judge*, concurring. I agree with the concurrence set forth by Judge Edwards. I write separately to express the view that the majority opinion is incorrect to place needlessly broad limits on the bad faith exception to the American Rule. The majority would constrain the bad faith exception to exclude the recovery of attorney's fees in cases involving bad faith in the conduct that leads to the underlying substantive claim. The Supreme Court's statement that "it is clear, however, that 'bad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation" has been used in support of awarding attorneys' fees. *Hall v. Cole*, 412 U.S. 1, 15 (1973). The Court cited this language seven years later in support of the proposition that attorney's fees could be awarded when litigation is *conducted* in bad faith rather than just *filed* in bad faith. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).

The *Hall* dicta has also been quoted by the Ninth Circuit as well as this Court in determining whether bad faith in the conduct leading to the underlying claim creates an exception to the American Rule. *McQuiston v. Marsh*, 707 F.2d 1082, 1086 (9th Cir. 1983); *Doghera v. Safeway Stores, Inc.*, 679 F.2d 1293, 1298 (9th Cir.), *cert. denied*, 459 U.S. 990 (1982); *Huecker v. Milburn*, 538 F.2d 1241, 1245 n.9 (6th Cir. 1976). As the majority notes, this Court has cited *Hall* in dicta "for the proposition that 'bad faith' which justifies the award of attorneys' fees may be demonstrated in the conduct which necessitated the action or in conduct occurring during the course of the action." Majority Opinion at 11 (citing and quoting

Huecker v. Milburn, 538 F.2d at 1245 n.9. The majority concedes that, given the facts in *Huecker*, this Court must have been referring to bad faith in the conduct which gave rise to the underlying claim.

The Ninth Circuit has also adopted the dicta in *Hall* to support similar awards of attorney's fees. In holding that a California district court committed clear error in finding bad faith on the part of a defendant employer that had dismissed an employee, the Ninth Circuit left little doubt that attorney's fees could be awarded where there was bad faith in the conduct that led to the underlying claim. *Doghera v. Safeway Stores, Inc.*, 679 F.2d at 1298. The Ninth Circuit implicitly upheld this proposition a year later by remanding a case to the district court for resolution of a factual dispute "as to the bad faith, if any, of the [defendant] both before and during the course of th[e] litigation" in order to determine if attorney's fees should be assessed. *McQuiston v. Marsh*, 707 F.2d at 1086. (Citing *Hall v. Cole*, 412 U.S. at 15).

Given the interpretation of Hall by the courts in *Huecker* and *McQuiston* and the refusal of the Supreme Court to grant certiorari in *Doghera* to overrule this interpretation, the majority should be less aggressive in limiting the bad faith exception to the American Rule. Despite contrary rulings by the Supreme Court and by this Court, the majority opinion would have the effect of preventing the award of attorney's fees in cases where plaintiffs are forced to bring legal action because of a defendant's flagrant violation of their legal rights. *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962) (Court held that seaman could be awarded attorney's fees as part of damages in suit against shipowners who failed to grant plaintiff his clear legal right to maintenance and cure while recovering from an illness contracted aboard ship). *Huecker v. Milburn*,

538 F.2d at 1245 n.9 (citing and quoting *Monroe v. Board of Commissioners*, 453 F.2d 259, 263 (6th Cir.), *cert. denied*, 406 U.S. 945 (1972)). In this case, the clear failure to grant Shimman his right to union participation without interference supports the original award of attorney's fees. However, in addition to this Court's pronouncement equally allocating costs on appeal, bad faith such as the failure to recognize clear legal rights is not presented as justification for an award of attorney's fees.

Given the precedents cited above, I am of the view that the majority should restrain its ruling on the bad faith exception only to the issue of granting attorney's fees for the appeal in question.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed October 16, 1975)

No. C 73-364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN C. SHIMMAN,
Plaintiff,

VS.

TERRY OLIVER GROTHAUS, *et al.*,
Defendants.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

YOUNG, *J:*

This case was originally commenced by the plaintiff against three named and two unnamed individuals, and two labor organizations, Local 18 of the International Union of Operating Engineers, and the International Union of Operating Engineers itself. Throughout this opinion, the defendant local union will be referred to simply as Local 18, and the other defendant union will be referred to as the International Union.

Plaintiff's complaint states four causes of action: first, for deprivation of his rights under Title 29, U.S.C. §411(a)(1) and (a)(2); second, a conspiracy to discriminate and deprive plaintiff of the equal protections of the laws and of

equal privileges and immunities under the law, in violation of Title 42 U.S.C. §1985(3); third, that the individual defendant John Frank, Local 18, and the International Union had power to prevent the wrongs committed but neglected and refused to do so contrary to the provisions of Title 42 U.S.C. §1986; and, fourth, that the defendants committed an assault and battery upon the plaintiff, injuring him severely.

The answers of all of the defendants are cast in the forms of general denials.

After a good deal of preliminary activity, including motions for dismissal and for summary judgment, all of which were overruled by the Court for reasons set forth in memoranda previously filed in the case, the matter came on for trial on September 22, 1975. The case was tried to the Court without the intervention of a jury, concluding October 2nd. This opinion will serve to express the Court's findings of fact and conclusions of law resulting from the trial.

The defendants moved for judgments in their favor at the close of plaintiff's case in chief. These motions were overruled. At the conclusion of all the evidence, these motions were renewed, but the Court reserved its rulings upon them. After consideration, the Court finds that these motions should be overruled, and the case be considered upon the facts, which are, in the main, disputed.

During the course of the trial the plaintiff offered a number of exhibits, to which defendants objected, and the Court reserved its ruling. These exhibits were plaintiffs' exhibits Z, AA, AB, AR, AS, AT, AU, and B, and defendants' exhibits 73, 148, 160, 170, 174, 182, 212, 213, 214, 271, 272, 273 and 274. After consideration, the defendants' objections are overruled. The exhibits are admitted into evi-

dence. Some of these exhibits were again offered by the plaintiff as part of his case in rebuttal. At that time, they were rejected, but solely because they were not proper rebuttal.

It should be noted that by previous order of the Court, the trial which was conducted was to deal only with the questions of the liability of the defendants to the plaintiff. The questions as to the relief to be granted were reserved for future hearing, contingent on the results of the hearing of the liability issues.

I. Plaintiff's First Cause of Action

It appeared from the evidence that Operating Engineers are people who operate various kinds of heavy equipment, such as bulldozers, cranes, generators, and steam boilers, to mention a few major varieties. The International Union functions under a very complex and rather peculiar Constitution, which permits most of its powers to be exercised most of the time by appointed officials. Local 18 operates under a set by By-laws which are similarly complex and peculiar. Local 18 covers the entire State of Ohio, and a portion of the State of Kentucky. It is divided into a number of so-called Districts, of which District 2 covers a group of counties in the Northwestern portion of Ohio, including Lucas County and Toledo, Ohio, where District 2 has its union hall.

Some of the officials of Local 18 are elected, and some are appointed. Some of those elected are elected by the entire membership of the Local, while others are elected only by the members of each separate district. From the evidence it appeared that the appointed officials for each district, who exercise great power, are appointed by the Local, with little or no control over the appointment by the members of the districts.

While the defendant Unions maintained that their organizations were very democratic, the defendant Frank defined "democracy" as being a system where one man runs things and all the others support him. In keeping with this concept, the ballots for elections were set up so that the candidates for various offices who were approved by the union hierarchy were listed in one group, while those whose candidates were not so approved were placed in another group. One witness testified that this deterred him from seeking elective office, since he would be singled out on the ballot unless he was an incumbent officer.

The evidence showed beyond any doubt that for a great many years there had been differences of opinion about the conduct of union affairs among the members of District 2 of the Local 18. The plaintiff and other members of his family had always been allied with what was referred to as the "rebels" or "dissidents." Although these members did not have a great deal of support outside District 2, and hence were usually soundly defeated when they ran for offices upon which all members of Local 18 voted, at the time of the events here involved, they were in the majority in District 2. Hence, in spite of the invidious distinctions on the ballots, at the elections held in the Summer of 1972, the plaintiff's brother Walter and a man named Raymond Rojek were elected to the Executive Board, and the defendant James Grothaus, an administration candidate, was defeated. However, the defendant Frank, the Business Manager of District 2, and a Vice-President of Local 18, who ran state-wide, defeated Ray Oberly, the opposing candidate, for the office of Vice-President.

Although there was much evidence that the defendant John Frank had used his powers as business manager to keep himself in office by punishing those opposed to him, apparently the defeat of James Grothaus and the

election of Raymond Rojek and Walter Shimman in 1973 was more than usually galling to him. The evidence establishes quite clearly that this was because he had been appointed Business Manager of District 2 for the purpose of ending the division among the membership by eliminating the leaders of the dissidents, and was failing to do so. Some of the dissidents had scored against the defendant Frank and Local 18 before the National Labor Relations Board, and against James Grothaus in an assault and battery case.

The evidence establishes beyond any doubt that at a meeting early in September, 1972, the defendant Frank stated that Raymond Rojek needed a fist in his mouth, but that the blood should flow in the streets, and not in the Union Hall. Thus the stage was set for the events which occurred at the general membership meeting of District 2 that was held on September 11, 1972.

Most of the evidence at the trial was concerned with the events of the September 11, 1972 meeting. While the evidence was not without conflict as to details, those conflicts were of the kind which always occur when a number of different witnesses are describing the same occurrence. Absence of such conflicts normally indicates a fabricated story.

The principal actors in the meeting that night were the plaintiff, his brother Ervin, and the individual defendants John Frank, James Grothaus, and his son, Terry Grothaus. The presence of the two Grothauses strengthens the conclusion that drastic means were to be resorted to in order to break the growing power of the dissident members. Neither of them had been working as an operating engineer for a long time. James Grothaus had gone into business for himself the previous December. (He was still so engaged at the time of trial, and had not

worked as an operating engineer since December, 1971.) Terry Grothaus had been severely wounded while a member of the United States Marine Corps in Viet Nam. As a consequence, he was on sick leave from his employment as a factory worker at Champion Spark Plug, where he had been employed since August, 1971. His last work as an operating engineer had been for a brief period shortly after his discharge from the military. He had never attended a Union meeting until the previous meeting on September 5, 1972.

The defendant Frank was in charge of the meeting, and set the tone by reporting the election results and denouncing in scatological terms the two members who had defeated candidates he favored. There were other indications that something out of the ordinary was going to happen, for the seating of those attending was unusual. The normal seating arrangements find the members of the dissident group sitting on the east side of the hall, with the organization leadership sitting on the west side. On September 11, the two Grothauses and some of their friends, including two who rarely, if ever, attended meetings, seated themselves on the east side of the hall, in proximity to the plaintiff and his brother Ervin.

The meeting was well along toward its close, and Ervin Shimman, who was located in his usual place, beside the drinking fountain, was addressing the chair when James Grothaus came up behind him, stamped his feet, and shouted. Shimman, naturally, was startled. James Grothaus, with mock solicitude, said "Did I scare you, Erv? I was only going for a drink of water." Instead of rebuking Grothaus for the interruption, the defendant Frank, in unbelievably crude and vulgar language, referred to Ervin Shimman's being startled. The episode provoked general laughter, and Shimman took his seat.

Ervin Shimman was taking notes in a small notebook, which he was accustomed to do. Although the Union had no rule forbidding this, and James Grothaus was well aware of that fact, he was accustomed to threaten note-takers that he would take their notes from them. He did this at the September 5, 1972 meeting, and was told that he had no right to do so. Nevertheless, on this occasion, after he had gotten his drink, and was returning rapidly to his seat, he reached over Ervin Shimman's shoulder and snatched his notebook, continuing with unbroken pace to his seat.

The plaintiff had been seated behind James Grothaus. Terry Grothaus was seated in the chair next to his father, James Grothaus. As James Grothaus was resuming his seat, the plaintiff attempted to reach over his shoulder and recover his brother's notebook. James Grothaus arose and made a complete turn around to his left, in the process striking plaintiff in the chest or stomach with his arm. The plaintiff doubled up and fell or was thrown against Terry Grothaus. Terry Grothaus pushed plaintiff to the floor, and kicked him several times in the head as plaintiff lay prone, attempting to cover his head with his hands.

The whole episode occurred very quickly, as if it had been well planned. People sitting nearby pulled Terry Grothaus away, and James Grothaus told him to get out, which he did immediately. James Grothaus turned the stolen notebook over to one of his friends, who afterwards destroyed it. The police and an ambulance were called, and plaintiff was taken to the hospital.

Thereafter, Ray Rojek resigned from his office. The plaintiff has not attended any more union meetings, nor has Glenn Oberle, who had run against the defendant Frank in the 1972 election.

There is no necessity for making an elaborate examination and analysis of the testimony adduced in this long trial. Much of it was cumulative, and, as previously mentioned, the conflicts and discrepancies relate only to details. The main factual elements are entirely clear. The real issues in this case are not as to what the facts were, but as to the conclusions to be drawn from them. Even on that basis, however, when viewed in the light of reason and experience, there can be no real doubt about the conclusions to be drawn.

The defendants spent a great deal of time at the trial going through a sort of litany based on the language of Title 29, U.S.C. §§411(a)(1) and 411(a)(2). Those sections, however, are designed to deal not with form, but with substance. In an atmosphere of coercion, the forms may still be perfectly observed, without the substantive purpose being carried out.

A telling example of this appears in the undisputed testimony concerning a meeting of the members of District 2. The minutes show that a rising vote of confidence in the defendant John Frank and his minions was moved, and that only the four Shimman brothers remained seated. The testimony, not disputed, was that when the question was put upon the motion, many members present did not rise at first. Thereupon the defendant Frank left the platform, and with curses ordered all the persons present to stand, continuing his adjurations until everybody but plaintiff and his brothers were standing.

Nor can the testimony be ignored, as it was not denied, that the defendant Frank, when he announced the election results, said that he knew who had voted in favor of two "unprintable words" (referring to Rojek and Shimman), and those voters would have to come crawling up the

aisle on their bellies before he would give them any service.

The conclusion is inescapable that when all other means of silencing dissent had failed, blood was made to flow in the union hall. After that Mr. Rojek resigned his office and plaintiff and Mr. Oberle have not returned to the union meetings. The dissenters were finally cowed into silence. The freedom and democracy which §411 was enacted to protect has been effectively destroyed in District 2. The plaintiff must prevail upon his first cause of action.

II. Plaintiff's Second Cause of Action

Plaintiff's second cause of action, which is brought under the third paragraph of Title 42 U.S.C. §1985, is by no means so clear. It is of course arguable, as plaintiff argues, that by its reference to "equal protection of the laws," or of "equal privileges and immunities under the laws," the word "laws" includes Title 29 U.S.C. §411. Certainly the evidence in the case leaves no room for doubt that all of the defendants conspired together to cause the violations of that statute which the Court has found did occur. A finder of fact has a right to use common experience and common sense in drawing inferences and reaching conclusions on the basis of proven facts. There is no requirement to accept parties' protestations of lack of any conspiracy or intent when their actions and language outside of the court, as shown in the evidence, prove the exact opposite, and also prove their unreliability as witnesses. The willingness of one allied in interest with the defendants, but not a party to the lawsuit, to go to jail for contempt rather than to testify to the inner machinations of the defendants is not without weight in showing the fear and distrust that the defendants' actions have created among the members of District 2 of Local 18.

Nevertheless, the Court does not believe that it is necessary to strain the meaning of §1985 in order to grant relief to the plaintiff. That statute was enacted a long time ago, to deal wih problems which, while they still exist, are clearly within its compass. §411 is strong enough to stand on its own feet. It is not necessary to resort to §1985 to give it force. It is perhaps arguable that it was necessary to enact §411 because §1985 was not intended to, and did not, cover the areas of our society with which §411 deals.

The Court concludes that the plaintiff has no right to recover against the defendants or any of them under the provisions of Title 42 U.S.C. §1985.

III. Plaintiff's Third Cause of Action

The Court's conclusion as to plaintiff's second cause of action seems to be dispositive of his third cause of action. Title 42 U.S.C. §1986 is specifically confined to relief against persons who were aware of conspiracy to violate §1985, and having the power to prevent any wrongdoing, neglected or refused to do so. Since the Court has found that there was no showing of a conspiracy in violation of §1985, the plaintiff's claims under §1986 must fail.

IV. Plaintiff's Fourth Cause of Action*

(A) The claim against the defendants James Grothaus and Terry Grothaus.

The plaintiff's fourth cause of action is a pendant claim for damages resulting from what is usually referred to as assault and battery. There is no doubt that the law of the State of Ohio preserves the common law right of action for trespass *vi et armis*.

> "Generally speaking, a civil action lies wherever the defendant on the same state of facts would be guilty of criminal assault or assault and battery, ..." 5 O.Jur.2d, Assault & Battery §19, p. 119, 120 (1954).

At the time of the happening of the events involved in this case, §2901.25 of the Ohio Revised Code provided in part that, "No person shall . . . strike or wound another. . . .".

There can be no doubt whatever from the evidence that the defendants James Grothaus and Terry Grothaus struck and wounded the plaintiff. The only questions are raised by the defendants' plea of *son assault demesne,* and the contention of the other named defendants that they were in no way involved in or responsible for the attack, and could have done nothing to prevent it.

There are two approaches to the claims of self defense by the defendants Grothaus. The first is that the beating of the plaintiff was merely the culmination of the assault and battery committed by the defendant James Grothaus on the plaintiff's brother Ervin Shimman. James Grothaus admits that he first assaulted Ervin, and then snatched his notebook from his hand. Nor does the evidence leave any doubt about these occurrences. According to his own testimony, James Grothaus was in continuous and rapid movement from the moment he seized the notebook until the plaintiff was thrown to the floor, and Terry Grothaus completed the attack by kicking the plaintiff in the head.

Quite apart from this, the claim of self-defense is defeated if more force is used than that necessary to repel the first attack. No reasonable mind could possibly conclude that it was necessary for James Grothaus to strike the plaintiff or hurl him violently against Terry

Grothaus, or that Terry Grothaus could only protect himself by kicking the plaintiff in the head as he lay prone and defenseless on the floor. Even assuming that Terry Grothaus really did suffer excruciating pain when the plaintiff fell against him, which the Court does not believe, his action in putting the boots to plaintiff can only be taken to negative the claim of self-defense by establishing that the defendants provoked the actions of the plaintiff in order to give them an excuse for inflicting severe injuries upon him.

The burden of proof is upon the defendants Grothaus to establish their plea of self-defense.

> "In addition, defendant, asserting this defense, must be free from fault; that is, he must not have purposely provoked the altercation or purposely brought on a combat or purposely placed himself in the way of having been assaulted in order that when assaulted he might have the pretext for assaulting the plaintiff." 2 OJI 124, Assault and Battery §219.15(b). *See also* 2 OJI 105, Assault and Battery §219.01(d).

Not only did the defendants Grothaus fail to carry their burden of proof of self-defense, the overwhelming weight of the evidence, including their own testimony, establishes their liability to the plaintiff.

(B) The claims against the defendant John Frank.

The problems with respect to the defendant John Frank are somewhat different, for he did not actually strike the plaintiff, and was, in fact, some distance from the plaintiff when the attack occurred.

However, the evidence leaves no doubt that by his conduct when James Grothaus made his initial attack upon Ervin Shimman, he was encouraging further as-

saults. His provocative language, not disputed, at the September 5th meeting undoubtedly set the stage for what happened to the plaintiff.

> "[I]t is the law of the State of Ohio that any person who is present at the commission of an assault, or an assault and battery, by one person upon another, and who . . . aided, abetted or procured its commission, or who incited or encouraged its commission, by words or actions, is equally liable in damages for the commission of such assault and battery, with the person or persons who actually struck, beat, wounded, or inflicted physical violence or injury on such other person." 2 OJI 109, Assault and Battery §219.01(i).

Taken as a whole, the evidence in this case leaves no doubt in the Court's mind that the defendant John Frank wanted to have some one of the dissident members beaten. He had every motive and reason for doing so. He was sent to get rid of the so-called "dissident" members of District 2. Not only had he failed up to this point, but when a secret ballot was taken, it was clear that the dissidents made up a majority of the members of the District. Gentler methods had failed, and physical force was the only thing left. He expressed a desire to have the blood flow in the street, and not in the union hall, but when one unleashes physical violence, it is usually impossible to control it with precision. Once an example had been made of the plaintiff, no further attacks appear to have been made, but the lesson was not lost on the membership. Witness the matter of the witness Delaney, one of defendant Frank's henchmen, who went to jail for contempt rather than to reveal what had brought the defendants Grothaus and their

friends, the two "pipeliners," to come to the meeting on September 11th and place themselves in positions of readiness for action.

The protests of innocence of the individual defendants and their cohorts are not believable in the total context of the trial. The Court finds the defendant John Frank is liable to the plaintiff.

(C) The claims against the defendant unions.

In general, of course, a corporation or association is not liable for assault and battery committed by its agents or servants. There are, however, exceptions to this rule. One is when the agents' actions are expressly authorized by the association. Another is where the association was so careless in the selection of its agents that it knew, or in the exercise of ordinary care should have known, that the agents it selected probably would act violently. 6 Am. Jur.2d 113, *Assault & Battery* §134. The evidence here sustains the liability of the defendant unions upon both of these bases.

It is elementary, of course, that associations can only act by or through their agents. In this connection it should be pointed out that under the peculiar organization of both the International Union and Local 18, practically all the activities of the unions were carried on by their business managers, who were not elected but appointed. The situation is analogous to that seen so often by any experienced judge of a criminal court, where the defendant does not deny being outside the burglarized building in the night season, but says "believe it or not, I was waiting for a streetcar." The unions' argument was not that the events did not happen, or that their ends were not in fact accomplished, but only that the individual defendants were just behaving childishly.

Both Local 18 and the International Union must bear the responsibility for the torts committed by the defendant John Frank, for John Possehl, who was appointed by the president of the International Union, and who was also a Vice-President of the International Union, was warned that the defendant Frank was a violent man, prone to violent and abusive language in his official activities, who would cause serious trouble if allowed to remain in command of District 2. Mr. Possehl was certainly available to both the defendant unions as a witness, and his failure to appear and deny the very serious charges made in the trial of this case is strong evidence of the truth of the complaint.

The Court has no doubt that both Local 18 and the International Union had determined that it would be necessary to use physical violence to beat the members of District 2 into submission, and that the named individual defendants were the agents selected for the purpose. It did not make any real or practical difference whether the victim was Mr. Rojek or one of the Shimman brothers. When there is a general intent to inflict physical injury, the fact that the designated victim escapes and an innocent bystander is wounded is no defense. The plaintiff may not have been exactly an innocent bystander, but in law, he was wrongfully injured, and all who played a part in injuring him should be held accountable.

The defendant unions got what they wanted, the suppression of the dissidents in District 2 of Local 18. Now let them pay the price for it.

The Court concludes that all of the defendants except the two unnamed defendants are liable for the injury and damage suffered by the plaintiff, and a verdict is rendered in his favor upon the liability issues. This cause

will be continued to a date to be fixed for trial of the issue of the damages to which the plaintiff may be entitled. In the event that this matter cannot be promptly resolved without the necessity of further trial, upon being advised of this fact by any of the parties, the Court will set the matter for a special pre-trial conference to make arrangements for further trial.

Plaintiff shall prepare and submit an order expressive of the Court's findings of fact and conclusions of law, in accordance with the Local Civil Rules.

/s/ DON J. YOUNG
United States District Judge

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT

(Filed February 14, 1977)

No. C 73-364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN C. SHIMMAN,
Plaintiff,

vs.

TERRY OLIVER GROTHAUS, *et al.*,
Defendants.

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

YOUNG, *J*:

This action arises out of a beating inflicted on the plaintiff by the defendants on September 11, 1972 at a union meeting in the Union Hall. The case was tried by the Court, sitting without a jury, although it is clear that the case was properly triable by jury had any of the parties timely asserted the desire to have it so tried. The Court thus acts as both judge and jury in the matter, rather than as a chancellor.

A bifurcated trial was ordered, and the liability issues were heard in a six day trial commencing on September

2, 1975. As the result of that trial, the Court concluded that the defendants were jointly and severally liable to the plaintiff upon his first and fourth cases of action, and the matter was continued for further hearing upon the damage issue. The Court's findings of fact and conclusions of law as to liability were embodied in an opinion which is incorporated herein by reference.

The defendants appealed from the Court's decision, but the appeal was dismissed since there had been no appealable final order.

Thereafter, a trial of the damage issue was had on July 1, 1976, requiring a full day for hearing. At the conclusion of the hearing, it was ordered that argument be by briefs, which were ultimately filed, together with a series of motions to strike portions of briefs, and to reconsider various matters. All of these motions will be overruled.

The plaintiff's claims for damages fall into three categories:

FIRST: compensatory damages resulting from plaintiff's injuries;

SECOND: punitive damages; and

THIRD: an allowance for plaintiff's attorney's fees.

The defendants' arguments are that as to compensatory damages, plaintiff really was not hurt; as to punitive damages, that either they are not properly recoverable at all, except at most as against the defendants Terry Oliver Grothaus and James Grothaus; and as to attorney's fees, all defendants argue that such fees may not properly be awarded in this action at all. The Court will discuss each category of damages separately.

I. *Compensatory Damages*

The evidence established without any question that as the result of the beating inflicted upon him, plaintiff suffered a concussion of the brain and a post-concussion syndrome. He was hospitalized for this from September 11 to September 24, 1972. Although there appeared to be no organic brain damage, the plaintiff developed a traumatic neurosis which required a number of subsequent hospitalizations, and both medical and psychiatric treatment. At the time of the damage hearing plaintiff was still receiving medication for this difficulty. During much of the treatment, plaintiff lost employment and his ability to work was still impaired at the time of trial, although he showed no actual loss of wages from this after 1974.

Although the defendants dispute plaintiff's damage claims, they offered no independent medical evidence to contradict that of plaintiff's witnesses, who were in substantial agreement as to his condition, and that his difficulties were not faked or malingering, as defendants argue.

The plaintiff is entitled to recover $8,009.80 of medical expenses and $24,058.19 loss of earnings up to the time of trial. There is, however, insufficient evidence to support any award for future medical expenses or loss of earnings, which must be demonstrated to a reasonable certainty.

A more difficult problem is to determine what amount will compensate plaintiff for his pain and suffering. This was acute in the period immediately following the assault, considerable for two or more years thereafter, and still continued to cause him trouble to the time of the damage issue hearing. The evidence leaves no doubt in the Court's mind that the plaintiff will continue to suffer from his injuries for a long time into the future, and will never fully recover from them.

The defendants undertake to twist some of the expert testimony concerning plaintiff's personality structure into establishing that his difficulties are not the result of the injuries, but are just a manifestation of his basic physical, mental, and emotional make-up. The law has always been that while a plaintiff cannot recover damages in a personal injury action for conditions suffered prior to the injury, if his pre-existing condition is aggravated or made worse by the injury inflicted by the defendant, he is entitled to recover for the aggravation. The fact that plaintiff might not be suffering as he is had he been of a different personality structure, is no defense to one who injures him, so long as his previous condition was within normal limits, as was the plaintiff's. *See Steinhauser v. Hertz Corp.*, 421 F.2d 1169 (2d Cir. 1970); *Kantor v. McKinley*, 9 Ohio App.2d 243, 224 N.E.2d 141 (Montgomery Cty. 1966); *Reeg v. Hodgson*, 1 Ohio App. 2d 272, 202 N.E.2d 310 (Scioto Cty. 1964).

There can be no doubt that the plaintiff's suffering was more acute than the mere physical pain of the injuries because the beating had the ultimate effect of depriving the plaintiff of his ability to continue to fight for what he believed was right in connection with the affairs of the Union. For a man who has always been free, to be forced by physical and mental agony to bow to despotism, and withdraw in defeat from the field of battle, is painful in the extreme. It leaves a wound that can never completely heal.

For his pain and suffering, humiliation, and loss of pleasures and companionship, both past and future, the plaintiff is awarded damages in the sum of $75,000.00, making the total amount of compensatory damages to which plaintiff is entitled to judgment the sum of $107,067.99.

II. *Punitive Damages*

There can be no question that upon plaintiff's fourth cause of action, his pendent State claim for assault and battery, the plaintiff is entitled to recover punitive damages. It is also clear, and in its findings upon the liability issues this Court found the facts to be such, that all of the defendants, the Local Union and the International Union, as well as the individual defendants, were fully liable for the assault and battery.

The defendant Unions and the defendant Frank, with a persistence that would be more admirable were it in a worthy cause, continue to argue that they cannot be held liable for the actions of their goons, or without ratification of the wrongdoing by the union members. It is only too clear from the evidence in this case that the members have little or no control over and responsibility for the actions and activities of the defendant Unions. At long intervals the members are allowed to vote on those things that the officers of the Unions permit them to vote upon. In the intervals between elections, all powers of the members are vested in the officers. Assuming, as defendants argue, that a body corporate can only be held liable for an assault when the assault is ratified by the members of the body, that ratification occurred automatically under the organizational structure of these Unions.

For the reasons set forth in this Court's findings and conclusions on the liability issue, the defendant Unions, and the defendant Frank, are jointly and severally liable with those who carried out their commands to let blood flow. The law is clear that ratification is only one of several grounds which can support a judgment for punitive damages against bodies corporate.

A more serious question is whether the plaintiff is entitled to recover punitive damages upon his first cause of action, the claim under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401 *et seq.* (hereafter LMRDA). There are a considerable number of district court cases going both ways on this question, which the parties cite and rely upon. The Fifth Circuit Court of Appeals has expressly held that if Unions act with actual malice (as in this case) or reckless or wanton indifference to a member's rights, they are liable for punitive damages. *International Bro. of Boilermakers, etc. v. Braswell,* 388 F.2d 193 (1968).

It should be noted that in the *Braswell* case, the Fifth Circuit Court of Appeals held that the plaintiff was entitled to a jury trial, contrary to the conclusion of the Court of Appeals for this Circuit that suits under the LMRDA are statutory proceedings unknown to the common law, and essentially an equity proceeding with the recovery of money damages being merely an incident to such relief. *McGraw v. United Ass'n of Journeymen & App. of Plumbing, etc.,* 341 F.2d 705, 709 (6th Cir. 1965). The Sixth Circuit Court of Appeals has made clear that in such actions, punitive damages may not be awarded. *Equal Employment Op. Com'n v. Detroit Edison Co.,* 515 F.2d 301, 308-310 (6th Cir. 1975).

Both of the Sixth Circuit cases just cited were basically different from the present case. Even though the *McGraw* case was brought under the LMRDA, it was actually an action for reinstatement into union membership after a wrongful expulsion, which certainly was properly characterized as "essentially an equity proceeding with the recovery of money damages being merely an incident to such relief." In the *Detroit Edison* case, also, the action was equitable, and what monetary relief was sought

was not money damages, strictly speaking, but restitution for lost wages.

In the present case, however, no equitable relief of any nature whatever is sought. It is strictly an action for damages for wrongs suffered in violation of law. As this Court has previously found, the defendants, individually and collectively, violated the provisions of 29 U.S.C. §411. 29 U.S.C. §412 provides that any person whose rights have been infringed by any violation of §411 "may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." It is interesting to note that the equitable aspect of "such relief" appears merely a parenthetical element of the statute. This would suggest, with all respect to the views expressed in the *McGraw* opinion, that an action at law for damages is what the Act is intended to provide, with equitable relief incidental. If an action for damages is appropriate, is it any less appropriate that such damages be punitive as well as compensatory? The *Braswell* case answers that question by quoting with approval, on page 200 of the opinion, the language of the New York Appellate Division in *Fittipaldi v. Legassie*, 18 A.D.2d 331, 239 N.Y.S.2d 792, 796 (1961), part of which is as follows:

> Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members . . . . The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders . . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.

It would be hard to imagine a clearer case of malice, wicked conduct, violence, and oppression than the one revealed by the evidence at the liability hearing in this case. This is not a matter for the reasonable, mild and gentle approach of the court of chancery, but for the powerful remedies of the common law, which routinely used smart money to punish and deter the cruel and violent.

The parties might have had a jury to determine this issue, but placed it instead in the hands of the court. Probably the imposition of punitive damages is better done by a jury than by a judge, but a judge should not shrink from imposing condign punishment when it is appropriate to do so. Certainly a judge can and should follow the rules which govern the jury in determining factual issues.

The plaintiff is entitled to punitive damages upon both his first cause of action under the LMRDA and his fourth cause of action for the pendent tort liability.

A much more difficult question, and one which is not subject to resolution by a simple examination of the law books, is what amount of punitive damages should be awarded in order really to make the various defendants smart: really to act as a deterrent to future wrongdoing. The plaintiff argues on the basis of the well established rules of the common law, that punitive damages should be apportioned not only upon the nature of the wrong that was done, but on the basis of the wealth and power of the wrongdoer.

Analyzing the evidence upon these matters, the plaintiff suggests that the punitive damages ought to be assessed against the defendant International Union in the sum of five million dollars, against the defendant Local Union in the sum of one million, eight hundred thousand dollars,

and against each of the individual defendants in the sum of one hundred twenty-five thousand dollars.

From an abstract standpoint, the defendant Unions could probably pay the millions asked of them with far less pain than the individuals could pay the much smaller sums suggested. Even as to the three individual defendants, the suggested sums would bear far harder upon the defendant Terry Oliver Grothaus than upon either of the other two individuals. Since all are in equal fault, it seems troublesome to punish the poorest one the hardest, even though his conduct was the vilest, and he appeared to be dishonest and a faker as well. Perhaps that is the way of the world "To him that hath shall be given, and from him that hath not shall be taken away even that which he hath."

The law as to the amount of punitive damages is expressed in 1 OJI 349, *Damages* §23.70c, as being an amount that should be fair and reasonable under all the circumstances. It should not be excessive, nor activated by passion and prejudice. It rests in the sound discretion of the fact-finders, and should be determined from all the evidence in the case. Devitt & Blackmar's *Federal Jury Practice and Instructions,* Vol. 2, Page 253, states that the amount of punitive damages "must be fixed with calm discretion and sound reason, and must never be awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

While the plaintiff in argument has laid emphasis on the necessity of making punitive damages large enough in amount to be really painful to entities which possess great wealth, and this Court has been using the terms "punitive damages" and "smart money," it must not be

overlooked that the basic reason for any use of punishment by our system of justice is not merely to cause the wrongdoer to suffer, but to deter wrongdoing; "to serve as an example or warning to others not to engage in such conduct" Devitt & Blackmar, *op. cit.* P. 202; "to make an example not only for the private good of the plaintiff, but for the public good, for the purpose of teaching other persons not to do likewise." 2 OJI 597, *Damages* §259.29.

It is also necessary to remember that if punishment is to deter the one punished, it must not be so severe that the memory of the wrongdoing will be blotted out by resentment over the pain of the punishment. Awards of millions against anyone, no matter how wealthy, tend to raise in the minds of both the wrongdoer and the public the thought, not of deterrence, but that what is being done is being done because of what the wrongdoer is, rather than what he did.

It is difficult to avoid passion, and to use calm discretion and sound reason, when dealing with parties as obdurate and obtuse as the defendants in this case, who have seemed at all times during the pendency, hearing, and argument of this case totally oblivious of the fact that what they were doing is both morally wrong, and forbidden by law. This Court is satisfied, however, that the award of an enormous amount of exemplary damages would not be any more likely to lighten the defendants' darkness than the award of amounts that would serve as examples and deterrents to ordinary and reasonably intelligent persons.

As against the defendant Unions, the plaintiff will be awarded exemplary damages in the sum of $250,000.00 against the defendant International Union, and the sum of $250,000.00 against the defendant Local 18. The Court

is aware of the fact that awards in the same amount might appear disproportionate in view of the far greater resources of the International Union than of Local 18. However, the involvement of the International Union, although amply great to leave no doubt of its liability, is less than that of Local 18. It also seems probable that more deterrence is required against the latter than the former, because of its more direct involvement in and greater opportunities to avoid repetition of, the wrongful conduct.

With respect to the individual defendants, the plaintiff will be awarded exemplary damages of $75,000.00 against the defendant John Frank; $75,000.00 against the defendant James Grothaus; and $25,000.00 against the defendant Terry Oliver Grothaus. Here the distinction in amount is based primarily upon the ability of the defendants to respond, and the consequent difference in deterrent effect. Granted that the conduct of the defendant Terry Oliver Grothaus was the most reprehensible, and his reason for being involved at all the least, it still seems most probable that the smaller amount is ample to keep him out of future wrongdoing, unless, as he appears to be, he is so lacking in intelligence or conscience as to mistake this Court's reason for weakness or sympathy. That is a risk the Court must take.

III. *Attorney's Fees*

The question of attorney's fees is closely related to the question of exemplary damages. In general, if a recovery of exemplary damages is proper, the Court may also make a reasonable allowance for the plaintiff's attorney's fees and expenses.

So far as the plaintiff's fourth cause of action is concerned, the pendent state claim for assault and battery,

there is no question of the plaintiff's right to recover attorney's fees as part of the damages to be awarded. An allowance of attorney's fees is pretty much standard in actions involving liability for intentional personal torts, so much so, in fact, that the jury is usually instructed to include them in the damage verdict without stating them separately, as must be done with a verdict for punitive damages.

The right to attorney's fees in connection with the first cause of action, for the violation of plaintiff's rights under the LMRDA, seems to be equally clear, particularly when there are findings of malice or wantonness.

The defendants suggest that under *Alyeska Pipeline Service Co. v. The Wilderness Society,* 421 U.S. 420 (1975), the plaintiff is not entitled to recover attorney fees. That decision, which has since been reversed by the Congress, deals with the so-called "private attorney general" concept in civil rights actions. This Court has never accepted that concept, but even if it had, in this case it has dismissed the plaintiff's civil rights claims. It should be pointed out, however, that even in *Alyeska,* the Supreme Court was careful to distinguish the proper allowance of attorneys fees in equitable actions when the losing party had acted in bad faith, vexatiously, wantonly, or for oppressive reasons. This Court's findings and conclusions upon the liability issue make abundantly clear that all of the defendants here acted in bad faith, vexatiously, maliciously, wantonly, wilfully, and entirely for oppressive reasons. They could not have innocently misunderstood that the LMRDA prohibited them from doing what they did. This Court is convinced that they did not misunderstand, but were so absolutely corrupted by the almost absolute power they exercised under the so-called constitutions and by-laws of the defendant Unions as to regard themselves as above the law.

Whatever approach is taken, the plaintiff is clearly entitled to recover a reasonable amount of his attorney fees and expenses in the prosecution of this action, although the Court is not persuaded that a recovery of attorney's fees is justified under the so-called "common benefits" approach. The plaintiff has vindicated his own rights. Whether the other dissident members of the defendant Unions will benefit cannot possibly be determined until all appeals have been exhausted in this case. If at that time, this Court's judgment still stands, it is possible that the rank and file members of the Unions will be better able to assert their rights under LMRDA than the plaintiff and his supporters have been. It will be interesting to see.

Stipulations of counsel enable the Court to find that a reasonable attorney's fees for the time spent by plaintiff's counsel would be $75,000.00, for which amount the plaintiff is entitled to judgment in his favor.

WHEREFORE, for the reasons stated, good cause appearing, it is

ORDERED that the motions of the defendants to strike portions of plaintiff's post-trial brief and the motion of the plaintiff to reconsider be, and the same hereby are, overruled; and it is

FURTHER ORDERED that the motion of the plaintiff for leave to respond to the reply brief of the Defendant International Union of Operating Engineers be, and the same hereby is, granted, and the clerk shall so file the plaintiff's brief; and it is

FURTHER ORDERED that the clerk enter judgment in plaintiff's favor in the sum of One Hundred Seven Thousand Sixty-seven Dollars and Ninety-nine Cents ($107,067.99) against the defendants jointly and severally as compensatory damages; and it is

FURTHER ORDERED that the clerk enter judgment in favor of plaintiff in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) against the Defendant International Union of Operating Engineers as exemplary damages; and it is

FURTHER ORDERED that the clerk enter judgment in favor of the plaintiff in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) against the Defendant International Union of Operating Engineers, Local 18, as exemplary damages; and it is

FURTHER ORDERED that the clerk enter judgment in favor of plaintiff in the sum of Seventy-Five Thousand Dollars ($75,000.00) against the Defendant James Grothaus exemplary damages; and it is

FURTHER ORDERED that the clerk enter judgment in favor of the plaintiff in the sum of Twenty-Five Thousand Dollars ($25,000.00) against the defendant Terry Oliver Grothaus as exemplary damages; and it is

FURTHER ORDERED that the clerk enter judgment in favor of the plaintiff in the sum of Seventy-Five Thousand Dollars ($75,000.00) against the defendants, jointly and severally, as and for his reasonable attorney's fees; and it is

FURTHER ORDERED that the clerk enter judgment in favor of the plaintiff in the sum of Seventy-Five Thousand Dollars ($75,000.00) against the defendant John Frank as exemplary damages.

IT IS SO ORDERED.

/s/ DON J. YOUNG
United States District Judge

EXCERPTS FROM THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed May 21, 1980)

No. 77-3338, No. 77-3339, No. 77-3340
No. 77-3341, No. 77-3342, No. 77-3343

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. SHIMMAN,
Plaintiff-Appellee, Cross-Appellant,

v.

JOHN FRANK, *et al.*,
Defendants-Appellants, Cross-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: ENGEL and KEITH, *Circuit Judges* and PECK, *Senior Circuit Judge.*

KEITH, *Circuit Judge.* This case concerns an incident at a union meeting where a dissident union member was beaten. The victim of the beating sued a number of defendants, including the local union and the international union. The district court found every defendant liable and assessed damages totalling over $850,000. We find that all but one defendant is liable, but substantially reduce the damages award.

FACTS

BACKGROUND

Local 18 of the International Union of Operating Engineers includes virtually the entire state of Ohio and a small

portion of the state of Kentucky. Local 18 has over 16,000 members who operate various types of construction equipment such as bulldozers and cranes. The local union is divided into six districts.

This case concerns events which occurred in district two of Local 18. District two encompasses fifteen counties in northwest Ohio. Its headquarters is in Toledo. Since October of 1968, the appointed district representative who runs district two has been John Frank.[1] Mr. Frank's leadership was strongly opposed by a group of dissidents led by four brothers—John, Ervin, Walter and William Shimman. Mr. Frank was not the first union official opposed by the dissidents. The Shimmans were long-time union members who had a history of opposing the incumbent leadership. The dissidents claimed that the local union leaders behaved dictatorially. They thought that the membership needed protection from arbitrary behavior by union leaders, particularly district representatives.[2]

The dissidents tangled often with the established leadership. In 1959, John Shimman filed suit under § 101 of the then recently passed Landrum-Griffin Act.[3] He claimed that the local union had arbitrarily refused to hold union meetings and that the local union leadership was conducting union affairs without regard for the wishes of

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1. Mr. Frank is also Vice-President of Local 18, an elected office.

2. In his brief, John Shimman advances the following as key dissident causes: 1) an open and fair job referral system, 2) a voice in the selection of district representatives, 3) open access to names and addresses of union members, 4) a non-discriminatory intra-union election ballot, and 5) democratically conducted meetings.

The district court characterized district two union democracy under John Frank as "a system where one man runs things and all the others support him."

* * * * *

the membership. After the suit was filed, the union resumed conducting open meetings. The case was eventually dismissed as moot.

Throughout the 1960's and early 1970's various dissidents ran for union office. At different times, John, Walter and Ervin Shimman ran for and served on the Executive Board of Local 18.[4] Dissidents enjoyed some success in elections where only district two members voted. Dissidents enjoyed no success in state-wide elections where all of Local 18's membership voted. The reason for this was that most dissident activites were centered in district two, where the Shimmans lived and had support. Not surprisingly, the dissidents' chief antagonist was the man who was in charge of district two, John Frank. Frank presided at district union meetings, oversaw the union's job referral system and otherwise conducted local union business at the district level. Frank's formal title was district representative. He was appointed, not elected.

Statewide, Local 18's chief executive officer is the business manager. The business manager's job is to direct and conduct all of the business of Local 18.[5] Among other duties, the business manager appoints district representatives like John Frank.[6] John Possehl is the business manager of Local 18. He more than anyone else ran Local 18.

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4. The Local Executive Board has residual governing authority over Local 18. The Executive Board can overrule actions taken by the Business Manager, who runs day to day union affairs. The Board is composed of the Local's chief elected officers-Business Manager, President, Vice-President, Treasurer, Recording Correspondence Secretary, Financial Secretary, as well as three members elected from each of these districts into which Local 18 is divided. Bylaws of Local 18, Art. XV.

5. Bylaws of Local 18, XVI, following, Constitution, International Union of Operating Engineers, Art. XXIII(i)(a).

6. *Id.*

In the 1971 local union election, William Shimman ran against John Possehl for the position of Business Manager. Dissident Glenn Oberle ran against John Frank for Vice-President. Both lost the election on a statewide basis, but did very well within district two.

Union elections were also held in the summer of 1972. Again, dissident Glenn Oberle ran against John Frank for Vice-President. Again Oberle lost, although he gained more votes than Frank did within district two. William Shimman also ran against John Possehl for Business Manager, but again lost. However, Walter Shimman and fellow dissident Raymond Rojek were elected to serve as two of the District's three representatives on Local 18's executive board.[7] James Grothaus, a supporter of John Frank, was defeated.

The above background facts are undisputed. Most of the facts surrounding the event which led to this suit are also undisputed. District Representative John Frank was conducting a regularly scheduled district two union meeting in Toledo, Ohio on September 11, 1972. Dissident union member Ervin Shimman was sitting in his seat taking notes. James Grothaus, a union member who supported the incumbent leadership, reached over Ervin Shimman's shoulder and snatched the notes. Grothaus darted away to his seat with the notes. Just as Grothaus was sitting down, John Shimman, Ervin's brother, reached over Grothaus' shoulder in an effort to retrieve the notes. Grothaus turned and knocked John Shimman to the ground. John Shimman was then surrounded by bystanders. Terry Grothaus, the son of James Grothaus, kicked John Shimman in the head several times before being pulled away.

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7. *See* n. 4 *supra*. The third member selected to represent district two on the executive board was Kenneth Delany was not a dissent.

John Shimman then filed the instant suit. He claimed that the beating he received was administered because of his dissident activities. He asserted that the beating violated his rights under § 101 of the Landrum-Griffiths Act.[8] In addition, he added a pendant claim under Ohio state law for assault and battery and a claim alleging a violation of 42 U.S.C. § 1985(3) and § 1986 because of a conspiracy to violate his civil rights.[9] The district court dismissed the civil rights claim, but upheld liability under the Landrum-Griffin and assault and battery claim.[10]

The District Court's Findings of Fact and Conclusions of Law

The district court ruled for the plaintiff in all significant respects. The court concluded that the beating had the purpose and effect of intimidating the dissidents. The court held that the beating had the obvious result

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8. *See* n. 3, *supra*.

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10. We note that the various causes of action alleged by plaintiff are coextensive. That is, the rights protected under the Landrum-Griffin Act, the Civil Rights Act and Ohio tort law are, in this case, one and the same. The reason is that liability is predicated on the beating John Shimman received. Depending on the motivation for the beating, it could constitute a violation of the Landrum-Griffin Act or the Civil Rights Act as well as being a common-law tort. However, for purposes of damages, it makes no difference on what theory liability is based. The beating is the basis for the damages award under all theories. *See U.M.W. v. Gibbs*, 383 U.S. 715, 721-29 (1966).

Because of this, we need not reach the issue raised in plaintiff's cross-appeal of the district court's determination that he could not maintain an action under 42 U.S.C. 1983(3) and § 1986. Even if the plaintiff could also bring suit under these Civil Rights statutes, his recovery would not be affected. *Compare Morrissey v. National Maritime Union of America*, 397 F. Supp. 659, 666 (S.D. N.Y. 1975), *affirmed in part, reversed in part*, 544 F.2d 19 (2d Cir. 1976) (jury could properly award separate damages for violation of the Landrum-Griffin Act and common-law-malicious prosecution).

of infringing on plaintiff John Shimman's rights, protected under § 101 of the Landrum-Griffiths Act. Further, the court concluded that the beating constituted an assault and battery under state law.

The court found that James and Terry Grothaus were active participants in the beating. They were assessed $75,000 and $25,000 punitive damages respectively. The court also found that John Frank had instigated and conspired to arrange the beating. He was assessed $75,000 in punitive damages. The court further found that Local 18 Business Manager John Possehl had sent Frank to suppress the dissidents. Accordingly, the court found Local 18 vicariously liable and assessed punitive damages at $250,000. On an identical theory, the court found the International Union liable and assessed $250,000 punitive damages against it. In addition, all defendants were held jointly and severally liable for $107,067.99 compensatory damages and $75,000 attorneys' fees.

The court's key findings regarding the beating were as follows:

> Although there was much evidence that the defendant John Frank had used his powers as business manager to keep himself in office by punishing those opposed to him, apparently the defeat of James Grothaus and the election of Raymond Rojek and Walter Shimman in 197[2] was more than usually galling to him. The evidence establishes quite clearly that this was because he had been appointed Business Manager of District 2 for the purpose of ending the division among the membership by eliminating the leaders of the dissidents, and was failing to do so. Some of the dissidents had scored against the defendant Frank and Local 18 before the National Labor Relations

Board and against James Grothaus in an assault and battery case.

The evidence establishes beyond any doubt that at a meeting early in September, 1972, the defendant Frank stated that Raymond Rojek needed a fist in his mouth, but that the blood should flow in the streets, and not in the Union Hall. Thus the stage was set for the events which occurred at the general membership meeting of District 2 that was held on September 11, 1972.

Most of the evidence at the trial was concerned with the events of the September 11, 1972 meeting. While the evidence was not without conflict as to details, those conflicts were of the kind which always occur when a number of different witnesses are describing the same occurrence. Absence of such conflicts normally indicates a fabricated story.

The principal actors in the meeting that night were the plaintiff, his brother Ervin, and the individual defendants John Frank, James Grothaus, and his son, Terry Grothaus. The presence of the two Grothauses strengthens the conclusion that drastic means were to be resorted to in order to break the growing power of the dissident members. Neither of them had been working as an operating engineer for a long time. James Grothaus had gone into business for himself the previous December. (He was still so engaged at the time of trial, and had not worked as an operating engineer since December, 1971.) Terry Grothaus had been severely wounded while a member of the United States Marine Corps in Viet Nam. As a consequence, he was on sick leave from his employment as a factory worker at Champion Spark Plug,

where he had been employed since August, 1971. His last work as an operating engineer had been for a brief period shortly after his discharge from the military. He had never attended a Union meeting until the previous meeting on September 5, 1972.

The defendant Frank was in charge of the meeting, and set the tone by reporting the election results and denouncing in scatological terms the two members who had defeated candidates he favored. There were other indications that something out of the ordinary was going to happen, for the seating of those attending was unusual. The normal seating arrangements find the members of the dissident group sitting on the east side of the hall, with the organization leadership sitting on the west side. On September 11, the two Grothauses and some of their friends, including two who rarely, if ever, attended meetings, seated themselves on the east side of the hall, in proximity to the plaintiff and his brother Ervin.

The meeting was well along toward its close, and Ervin Shimman, who was located in his usual place, beside the drinking fountain, was addressing the chair when James Grothaus came up behind him, stamped his feet, and shouted. Shimman, naturally, was startled. James Grothaus, with mock solicitude, said "Did I scare you, Erv? I was only going for a drink of water." Instead of rebuking Grothaus for the interruption, the defendant Frank, in unbelievably crude and vulgar language, referred to Ervin Shimman's being startled. The episode provoked laughter, and Shimman took his seat.

Ervin Shimman was taking notes in a small notebook, which he was accustomed to do. Although the

Union had no rule forbidding this, and James Grothaus was well aware of that fact, he was accustomed to threaten note-takers that he would take their notes from them. He did this at the September 5, 1972 meeting, and was told that he had no right to do so. Nevertheless, on this occasion, after he had gotten his drink, and was returning rapidly to his seat, he reached over Ervin Shimman's shoulder and snatched his notebook, continuing with unbroken pace to his seat.

The plaintiff had been seated behind James Grothaus. Terry Grothaus was seated in the chair next to his father, James Grothaus. As James Grothaus was resuming his seat, the plaintiff attempted to reach over his shoulder and recover his brother's notebook. James Grothaus arose and made a complete turn around to his left, in the process striking plaintiff in the chest or stomach with his arm. The plaintiff doubled up and fell or was thrown against Terry Grothaus. Terry Grothaus pushed plaintiff to the floor, and kicked him several times in the head as plaintiff lay prone, attempting to cover his head with his hands.

The whole episode occurred very quickly, as if it had been well planned. People sitting nearby pulled Terry Grothaus away, and James Grothaus told him to get out, which he did immediately. James Grothaus turned the stolen notebook over to one of his friends, who afterwards destroyed it. The police and an ambulance were called, and plaintiff was taken to the hospital.

Thereafter, Ray Rojek resigned from his office. The plaintiff has not attended any more union meet-

ings, nor has Glenn Oberle, who had run against the defendant Frank in the 1972 election.

On appeal, the defendants have challenged every finding of fact and conclusion of law made by the district court.[11] We will examine their claims *seriatim.*

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II. LIABILITY OF THE INDIVIDUAL DEFENDANTS UNDER THE LANDRUM-GRIFFIN ACT

A. General Considerations

On appeal, the defendants have attacked the district court's findings of fact as unsupported by the record. Defendants admit that John Shimman was beaten at the September 11, 1972, union meeting, but claim that the beating was an isolated, spontaneous incident of short duration. Defendants argue that neither John Shimman, his brothers, nor any of the dissidents has ever been refused the right to attend or speak at union meetings or to exercise any "union democracy" right conferred by § 101.

The record does contain much evidence that John Shimman and his fellow dissidents were never prevented from attending union meetings, from voting in union elections, or from openly exercising their free speech rights. Indeed, John Shimman testified directly that this was so.

The defendants did not forcibly eject the dissidents from union meetings. Nor did the defendants physically prevent the dissidents from speaking out, nominating candidates or otherwise participating in union business. Defendants couple these facts with the argument that the beating of John Shimman was a spontaneous, unpredictable

occurrence to reach the conclusion that no § 101 violation took place.

There is evidence in the record supporting defendants' argument. The fact that the dissidents have long existed and remained active in the union indicates that they were vigorously exercising their rights. Further, to many if not most of the 80 or so union members who attended the meeting on September 11, 1972, the scuffle between John Shimman and James and Terry Grothaus did appear to be spontaneous and unexpected.

Unfortunately for the defendants, the district court did not agree with their theory of the beating. The court thought that the September 1972 incident was far more than a simple altercation between union members. The court concluded that the beating of John Shimman was part of a scheme directed by John Frank to intimidate the dissidents and cower them into silence.

We do not doubt that a deliberate attack on a union member can amount to a violation of § 101. In fact, there are few more direct ways of chilling the exercise of a union member's Landrum-Griffin Act rights than by beating him up.[16] The real issue here is whether the record supports the district court's determination that the beating

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16. Most of the reported cases brought under § 101 have concerned abusive use of union disciplinary machinery. *See e.g., Rosario v. Amalgamated Ladies Garment Cutters Union, Local 10 ILGWU*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, ... U.S. ..... (1980); *Feltington v. Moving Picture Machine Operators*, 605 F.2d 1251 (2d Cir. 1979), *cert. denied*, ... U.S. ..... (1980). Formal expulsion of a member for exercising his free speech rights is the "classic" example of a § 101 violation. *Giordani v. Upholsterers Int'l Union of No. America*, 403 F.2d 85 (2d Cir. 1968); *Farowitz v. Assoc. Musicians of Greater New York*, 330 F.2d 999 (2d Cir. 1964). Other examples are discriminatory job referrals, *Vandeventer v. Local Union No. 513 of the Int'l Union of Operating Engineers*, 579 F.2d 1373 (8th Cir. 1978); *Newman v. Local 1101*

(Continued on following page)

was deliberately administered in order to teach the dissidents a lesson. An isolated fight between two union members has nothing to do with the Landrum-Griffin Act. A beating designed to punish dissidents violates the Act.

Of course, under F.R.Civ.Pro. 52, we cannot substitute our judgment for that of the district court. We can only reverse findings of fact if we are convinced that they are clearly erroneous.

B. Liability of John Frank and James and Terry Grothaus

The district court's conclusion that John Frank, James Grothaus and Terry Grothaus conspired to intimidate the dissidents is not clearly erroneous. Nor can we overturn the court's conclusion that the beating of John Shimman was at the very least a forseeable result of events which Frank and the Grothauses deliberately set in motion.

It is not disputed that John Shimman and his brothers were the leaders of a long established group of dissidents

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Footnote continued—

Communications Workers, 570 F.2d 439 (2d Cir. 1978), *opinion after remand*, 597 F.2d 833 (1979); *Keene v. Int'l Union of Operating Eng.*, 569 F.2d 1375 (5th Cir. 1978), and discriminatory intra-union job dismissal or transfer. *Cooke v. Orange Belt Dist. Council of Painters*, 529 F.2d 815 (9th Cir. 1976); *Wood v. Dennis*, 489 F.2d 849 (7th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974). *But see Newman v. Local 1101, Communications Workers of America, AFL-CIO*, 570 F.2d 439 (2d Cir. 1978); *Wamblas v. Int'l Bro. of Teamsters*, 488 F.2d 888 (5th Cir. 1974); *Sheridan v. United Bro. of Carpenters*, 306 F.2d 152 (3d Cir. 1962). *See generally Beaird & Player, Free Speech and the Landrum-Griffin Act*, 25 Ala.L.Rev. 577 (1973).

A beating designed to intimidate union members, however, can also violate § 101. Judge Lively's words in *Kuebler v. Cleveland Lithographers & Photo. U. Loc. 24-P*, 473 F.2d 359, 364 (6th Cir. 1973) are applicable here:

> It was a concern for greater democracy within unions which originally prompted Congress to enact [the Bill of Rights Provisions of the Landrum-Griffin Act] . . . . [N]o democracy can flourish where freedom of speech and assembly are hindered by threats of reprisal . . .

in district two. The hostile relationship between the dissidents and the entrenched leadership, that of John Frank, is a matter of record.

In January of 1972, dissident Walter Shimman filed unfair labor practice charges with the National Labor Relations Board against Local 18. He charged that the local had discriminated against him in job referrals and had threatened him and fellow dissidents with reprisals because of the dissidents' opposition to the established leadership. Dissident Glenn Oberle filed similar charges in April of 1972. The charges were consolidated and a hearing was held before an NLRB Administrative Law Judge in July of 1972. In an exhaustive opinion, the ALJ found that John Frank threatened to retaliate against the dissidents on numerous occasions in 1971 because of their anti-incumbent activities. He also found that Frank carried out his threats by denying Walter Shimman and Glenn Oberle job referrals to which they were entitled. The NLRB adopted the ALJ's findings and this court enforced the Board's order. *International Union of Operating Engineers, Local 18, AFL-CIO,* 205 NLRB 146 (1973), *enforced,* 500 F.2d 48 (6th Cir. 1974).

Much of the testimony which was presented to the ALJ was repeated in the trial below. This testimony supports the NLRB's finding that John Frank discriminatorily refused to permit dissidents Walter Shimman and Glenn Oberle to work because they ran for union offices in opposition to the incumbent leadership in 1971 and engaged in other intra-union political activities.

The antagonism between John Frank and the dissidents cannot be questioned. In the words of one witness, the dissidents were a thorn in John Frank's side. The district court found that when threats and job reprisals did not

succeed in intimidating the dissidents, that Frank turned to violence.

We find extensive evidence in the record to support this finding. Former union member Barney McCoy testified that John Frank asked him to be one of "a half-dozen good men to straighten some of these people out"—"people like Jack [John] Shimman, Bill [William] Shimman and Bud [Glenn] Oberle." McCoy had no doubt what John Frank meant:

> The substance was that he wanted whatever it took to get them out of the hall. Now, when you talk to this man when he makes a statement of that nature you know what it takes. The word murder wasn't in there, but you had a good idea "whatever it took" means.

McCoy testified that Frank promised that "everything will be taken care of" including attorneys' fees should any of the men be caught. Frank mentioned two other "good men" to McCoy in the conversation: Kenneth Delaney and James Grothaus. Mr. Delaney was held in contempt of court for refusing to testify in the trial below. James Grothaus was one of the men who struck John Shimman on September 11, 1972.

In July of 1972, testimony was being taken before the NLRB's Administrative Law Judge on Glenn Oberle's and Walter Shimman's charges of discriminatory job referrals. At a union meeting during this time, John Frank verbally attacked Glenn Oberle for going to the NLRB. Ken Delaney and James Grothaus joined Frank in ridiculing dissident Oberle.

The dissidents usually took notes at union meetings. John Frank was strongly opposed to this practice. He

ran the meetings and much of what he said was being taken down. During the NLRB hearing in July of 1972, dissident notes proved useful in refreshing the dissidents' recollections. With the help of the notes, the dissidents were able to testify with precision regarding John Frank's conduct. At an August, 1972 Advisory Board[17] meeting of District Two, the notetaking issue was brought up. This was the first such meeting since the NLRB hearings. Two dissidents testified at trial that James Grothaus stated at the advisory board meeting that no one taking notes was going to leave the meeting with the notes. John Frank stated that the dissidents were permitted to take notes, but that disciplinary proceedings might be invoked.[18]

In August of 1972, union election results concerning the 1972 elections were published. As previously mentioned, the dissidents had fielded many candidates for a variety of union offices. William Shimman had run against John Possehl for business manager of Local 18. Glenn Oberle had run against John Frank for Vice-President of Local 18. These were "statewide" officers, voted on by the full membership of the local. In addition, the dissidents ran for offices within the district. Dissidents Ray Rojeck and Walter Shimman ran for the position of district representative to the local's executive board.[19]

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18. There is evidence that the notes were a sore point with the incumbent leadership. Ervin Shimman testified that at a May, 1972 advisory board meeting, James Grothaus threatened him, saying "You little cheap m — — — — — — someday I'm going to get those notes from you." Ervin Shimman also testified that at a regular union meeting in the summer of 1972, John Frank threatened him about his note-taking. John Frank denied that he was concerned about dissident notetaking. However, the district court concluded otherwise and there is substantial evidence in the record supporting its finding.

19. *See* n. 4, *supra.*

In addition, Walter Shimman ran for a seat on the district advisory board.[20]

The dissidents did not succeed in the statewide elections for union office, but made a good showing within district two. In fact Glenn Oberle collected more votes within the district than John Frank did for the Vice-President's spot. Moreover, the dissidents were very successful in the district level elections. Ray Rojek and Walter Shimman were elected as district representatives to the local's executive board. James Grothaus, who also ran for that office, was defeated.

On September 5, 1972, another district advisory board meeting took place. This was the first union meeting of any kind since the election results had been announced. John Frank presided at this meeting. He was not pleased with the dissidents' partial election successes. The district court credited testimony that John Frank stated at the meeting that dissident Ray Rojek needed a fist in his mouth, and that blood should flow in the streets, although not in the union hall. In addition, there was testimony that James Grothaus sat between dissidents Walter Shimman and Ray Rojek at the meeting and engaged in a tug of war with Mr. Rojek over the latter's briefcase. The district court reasonably found that the words and conduct of both Mr. Frank and Mr. Grothaus were threatening.

The regular membership meeting of District 2 took place on September 11, 1972. This was the meeting at which John Shimman was beaten. Since the meeting was attended by over 80 union members, there is extensive testimony in the record as to what occurred. There are,

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of course, many minor variances in the testimony. The district court's view of the testimony, reproduced above, is a fair and reasonable account of what happened.

Upon review of the record, we are convinced that the district court could have credited dissident testimony that the seating arrangement at the meeting was unusual in that Frank's supporters were seated in areas normally occupied by dissidents. The court could have reasonably inferred that Frank's verbal attacks on the dissidents during the meeting and his refusal to keep the meeting under control was part of a scheme to physically attack one of the dissidents. The court could have also inferred the existence of a conspiracy from Frank's open approval of James Grothaus' conduct when Grothaus threateningly rushed Ervin Shimman prior to getting a drink of water and stealing Shimman's notebook.

There is additional evidence from which the court could have inferred that the beating of John Shimman was not spontaneous. James Grothaus was self-employed. He had not worked as an operating engineer since December, 1971. His son, Terry Grothaus, worked for the Champion Spark Plug Company and had not worked as an operating engineer since 1970. Two friends of James Grothaus, Gary Agler and Albert Dawes were unknown to anyone else. The only union meetings ever attended by Terry Grothaus, Agler, or Dawes were the September 5, 1972, advisory board meeting where the dissidents were threatened and the September 11, 1972, general meeting where John Shimman was beaten up. The district court was not bound to accept Terry Grothaus', Agler's and Dawes' conflicting explanations as to why they picked those particular meetings to attend. Nor was the district court bound to accept James Grothaus' testimony that

he never actually struck John Shimman, or Terry Grothaus' testimony, that he kicked John Shimman on the floor because Shimman had struck him while trying to retrieve the notes.[21] We note that James Grothaus and Terry Grothaus weighed over 220 pounds each. John and Ervin Shimman were estimated to weigh about 170 pounds each.

We reiterate that the incident in question here was not a spat among old friends. It was the culmination of years of antagonism. For example, there was testimony that John Frank continually threatened and verbally abused the dissidents.[22] The evidence outlined above supports the district court's conclusion that the defendants resorted to violence after their other efforts to silence the dissidents had failed.[23]

As the district court noted, most of the facts in this case were not disputed. It is true that the defendants disclaimed liability and denied making some of the more egregious statements attributed to them. However, their credibility was for the fact-finder to determine. Ultimately, this case hinges on the reasonableness of the inferences drawn by the district court. Upon careful review of the record, we find the court's inferences reasonable and well-supported. John Shimman was beaten by thugs

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21. The Grothaus's self-serving testimony was contradicted by virtually every other witness.

22. There was testimony that John Frank routinely made verbal attacks on the dissidents at union meetings. Ervin Shimman testified that John Frank told him on several occasions that he (Frank) was giving to starve him and the other dissidents out. Similarly, there was testimony that Frank often stated that he was going to "get" the dissidents.

23. Under long-established principles of tort law, the defendants' conduct also constituted an assault and battery under Ohio law. The district court properly found liability under this theory.

acting at the direction of John Frank because of Shimman's dissident activities.[24]

III. LIABILITY OF THE DEFENDANT UNIONS

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A. Liability of Local 18

We see ample evidence in the record suporting a finding of liability against Local 18. The conduct of John Frank and John Possehl is the basis for this liability. Frank, of course, was the appointed head of district two as well as vice-president of the local. Possehl was the Business Manager of the local.

Much of the evidence in the record regarding John Frank's conduct has already been outlined above. There is more. Ervin Shimman testified that he had a lengthy telephone conversation with John Frank on October 14, 1971. Ervin Shimman testified that during this conversation Frank made numerous threats, including "if you don't go along with me, you are my enemy, and I destroy all my enemies." Frank also stated: "I am the hatchetman from

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24. As the district court noted, John Shimman was clearly not a designated target to be beaten. The defendants had no way of knowing that John Shimman would immediately respond as he did to the seizure of his brother's notes. Rather, James Grothaus's rushing at Ervin Shimman and subsequent theft of his notes was itself an intimidatory practice. Grothaus was seeking to intimidate the dissidents and set up a confrontation with them. As indicated, the district court concluded that Grothaus had planned for violence that night. We cannot overturn this inference. Even if we could, the record clearly shows that violence was a logical result of the confrontation. Similarly, even if John Frank had no specific advance knowledge of what James Grothaus was going to do at the meeting, there is ample evidence to support a finding of liability. Much evidence supports the inference that Frank instigated and supported Grothaus in his anti-dissident "campaign." Even if Grothaus went a bit further than Frank anticipated, Frank is still liable.

Cleveland. I come here to chop heads and you are one of the heads I am going to chop."

The next day, Ervin Shimman spoke with John Possehl and informed him of John Frank's threats. Possehl did intercede with Frank and arranged for Ervin Shimman to get a job referral to which he was clearly entitled. At about this time, John Frank was denying work assignments to Glenn Oberle and Walter Shimman.[28] Walter Shimman complained to John Possehl about this, but received no satisfaction. Walter Shimman testified that he outlined Frank's conduct to John Possehl and requested Possehl to remove Frank from the district before there was trouble. Possehl's response was "no, I sent him here for a job and he going to do it. I know there is trouble in this district and I know it is in the office."[29] On September 16, 1971, Glenn Oberle wrote to John Possehl, also outlining John Frank's conduct. Possehl sent back a non-committal letter but apparently took no action. The testimony regarding John Possehl is unrefuted.[30]

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28. As previously indicated, this controversy ended up before the National Labor Relations Board, whose determination in favor of Walter Shimman and Glenn Oberle was enforced by this court. Both Walter Shimman and Glenn Oberle testified at the trial below.

29. Walter Shimman also testified that Possehl said he did not think that John Frank's conduct was right and he (Possehl) would look into it. However, so far as the record shows, Possehl did nothing.

Later on, in April of 1972, Walter Shimman complained once again to John Possehl about John Frank. Frank was discriminating against Walter Shimman's son in job referrals. Possehl promised to intercede, but did not. The discrimination stopped after Walter Shimman called Local 18's counsel and threatened legal proceedings.

30. John Possehl is a mysterious figure in this litigation. He was not sued individually. Yet his conduct was the basis for the International's liability and a partial basis for the local's liability. No one took his deposition. He did not testify at trial. The record does not even show how long he has been business manager of Local 18, although it appears that he held that post since at least 1959.

The plaintiff argues, and the district court apparently found, that Possehl sent Frank to suppress the long-time dissidents in district two. It is clear that Possehl failed to act when informed of John Frank's abusive conduct.[31] Although there is no direct evidence in the record of open antagonism between Possehl and the dissidents, it is obvious that their interests were opposed. Possehl, as Business Manager of Local 18, was a key official opposed by the dissidents. Indeed, they ran candidates against him. Possehl essentially did nothing when he received notice of John Frank's illegal and highhanded conduct. Possehl at the very least had an obligation to see to it that his subordinate, John Frank, did not flout the law.

The conduct of Frank and Possehl, in our opinion, justifies finding Local 18 liable. Frank was the district representative who ran district two on behalf of Local 18. His long-term antidissident conduct was within the scope of his authority. Frank's conduct in instigating the beating of John Shimman is imputable to the local union. The local's liability also stems from business manager John Possehl's inaction despite continuing anti-dissident conduct by John Frank.[32]

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31. It is stretching things a bit to say that Possehl sent Frank to silence the dissidents. This is especially true since Frank was first appointed district representative for district two in 1968. The beating took place in 1972. On the other hand, there was apparently continual friction between Frank and the dissidents from the time Frank first arrived. The district court's conclusion that Frank turned to violence after other methods failed is a permissible inference given evidence of escalating conflict over the years.

32. This inaction was such that the district court could have reasonably concluded that Possehl authorized Frank's conduct.

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IV. DAMAGES

A. Actual Damages

The district court awarded John Shimman $107,067.99 compensatory damages. Of this amount, $32,067.99 was for medical bills and lost wages and $75,000 was for pain and suffering. The medical bills totaled just over $8,000. No one disputes them. The lost wage award of $24,058.19 is challenged on appeal. The district court did not state how it computed this amount. An examination of days and hours of work lost for the years 1972-74, however, reveals that the court's finding is reasonable. Plaintiff presented evidence that he missed 488 hours of work in 1972, 608 hours in 1973 and 280 hours in 1974 due to hospitalization and illness resulting from his injuries. Even including this lost time, John Shimman worked less than average hours in each of the years in question. Accordingly, additional sums were added to compensate him for his below average earnings. True, this latter computation is open to some doubt because it assumes that all of John Shimman's below average working hours from 1972-1974 were due only to the beating and not to any other cause. However, there was uncontraditced medical testimony in support of this proposition. In addition, the total lost wage is reasonable if one compares John Shimman's 1970-1972 pre-beating earnings with his 1972-1974 post-beating earnings. The difference is about $25,000.

Defendants also attack the $75,000 pain and suffering award as excessive. They emphasize that John Shimman suffered no organic injury except a small cut on the back of his hand while he protected his head from Terry Grothaus' kicks. It is true that x-rays and lab tests were negative and that John Shimman required no surgery.

There was, however, extensive evidence presented that John Shimman suffered very real psychiatric problems because of the beating. Doctors who treated John Shimman immediately after the beating diagnosed him as suffering from a cerebral concussion. He complained of pain, dizziness, loss of memory. Doctors and nurses noted that he was nauseous, restless, afraid and occasionally spoke incoherently. For the next two years, plaintiff suffered from anxiety, tension and depression. He was hospitalized several times and given both electroshock and insulin shock treatments. He has continued to receive psychotherapy and medication.

Defendants presented no medical evidence in opposition to the plaintiff's extensive presentation. Defendants did suggest that perhaps the plaintiff was malingering or exaggerating his injuries. However, they presented no evidence to this effect. The plaintiff's doctors testified that he was not faking. The plaintiff underwent extensive therapy and continues to take medication. Still, he tried to, and did work after the beating, albeit fewer hours than before. There is no evidence of malingering in this record.

Defendants also suggest that plaintiff's difficulties stemmed from his personality structure and not from the beating. It is true that the psychiatric testimony labeled plaintiff's personality structure as passive-aggressive. All that this means, however, is that the plaintiff's personality may have made it difficult for him to bounce back from the physical and emotional trauma of the beating. However, the *cause* of plaintiff's anxiety, depression, etc., was the beating. Defendants must take their victim as they find. Prosser, Law of Torts, 261-62 (4th ed. 1971); Restatement 2d of Torts § 461 (1965).

Given the uncontradicted medical testimony, we do not find excessive the district court's award of $75,000 for pain and suffering. The award was within the bounds of discretion.

B. Attorneys' Fees

The district court awarded plaintiff $75,000 in attorneys' fees. The parties have stipulated that the amount was reasonable. The only question is whether they should have been awarded.

Attorney's fees are allowed in § 412 suits brought to vindicate § 101 rights. *Hall v. Cole,* 412 U.S. 1, 14 (1973). This is true under two theories: 1) when defendants act maliciously, in bad faith: 2) where plaintiffs' action has resulted in a common benefit. *Hall v. Cole, supra.* Attorneys' fees are also allowed in assault and battery cases under Ohio law. *Gates v. City of Toledo,* 57 Ohio St. 105, 111 (1897). The district court found that the defendants had acted in bad faith and awarded attorney's fees on that rationale. The district court also thought that Frank and the Grothaus' had lied at trial. As we have previously stated, the record supports the district court's finding that John Frank encouraged or directed the Grothaus' beating of John Shimman. We think that this finding warrants the award of attorneys' fees because of defendants' malicious conduct. We do not need to discuss the "common benefit" rationale.

V. PUNITIVE DAMAGES

The district court awarded a total of $675,000 in punitive damages—$250,000 against the International, $250,000 against Local 18, $75,000 against John Frank,

$75,000 against James Grothaus and $25,000 against Terry Grothaus. Because of our previous finding that the International Union could not be liable, the punitive damage award against it cannot stand. The question is whether the remaining punitive damages awards can stand. Punitive damages, where legally appropriate, should be awarded to punish but not to destroy.

As a threshold matter, the defendants argue that punitive damages are unavailable under § 101. This issue is uncertain in light of the Supreme Court's recent decision in *International Brotherhood of Electrical Workers v. Foust,* 99 S. Ct. 2121 (1979). There, the Court ruled that punitive damages could not be awarded against a a union which breached its duty of fair representation under the Taft-Hartley Act. The Court specifically left open the issue of the availability of punitive damages under § 101 *Id.* at 2125 n. 9. Four members of the Court who disagreed with the majority's *per se* rule, however, noted that the rationale for the majority's opinion also extended to § 412 suits *Id.* at 2125.

The courts of appeals are unanimous on the issue, however. In *Int'l Brotherhood of Boilermakers v. Braswell,* 388 F.2d 193 (5th Cir.) *cert. denied,* 391 U.S. 935 (1968); Judge Wisdom wrote that punitive damages are allowable on a showing of "actual malice or reckless or wanton indifference" by a union for the rights of its members. *Id.* at 199. That holding has been endorsed by the second and ninth circuits. *Morrisey v. National Maritime Union,* 544 F.2d 19 (2d Cir. 1976); *Cooke v. Orange Belt District Council,* 519 F.2d 815 (9th Cir. 1975).

This court, in *McCraw v. United Association of Journeymen & App. of Plumbing,* 341 F.2d 705, 706-07 (6th Cir. 1965) strongly suggested that punitive damages were

unavailable under § 101.[42] *McCraw*, however, has been subject to severe criticism by other courts. *See Feltington v. Moving Picture Machine Operators*, 605 F.2d 1251, 1257-1258 n.4 (2d Cir. 1979), *cert. denied*, ... U.S. ..... (1980); *Simmons v. Avisco Local 713*, 350 F.2d 1012, 1018 (4th Cir. 1965). *See also Hildebrand v. Bd. of Trustees*, 607 F.2d 705, 707, 708 n.4 (6th Cir. 1979).

We need not address *McCraw's* present viability. The reason is that the underlying conduct complained of was an assault and battery under Ohio law. Punitive damages are clearly available under this pendant state claim, which is coextensive with the § 101 claim.[43] Indeed, punitive damages in such situations have become "common-place." *Ranells v. City of Cleveland*, 41 Ohio St. 2d 1, 321 N.E.2d 885, 887 n.2 (1975). The question remains whether the punitive damages awards were excessive[44] and whether punitive damages should have been

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42. The reason for this is that *McCraw* states that the § 101 suit there filed was "essentially an equity proceeding for reinstatement as a member of the Local Union, with the recovery of money damages being merely an incident to such relief." 341 F.2d at 709.

43. *See* n. 10, *supra*.

44. The district court correctly outlined the legal principles which are applicable here:

> The law as to the amount of punitive damages is expressed in 1 OJI 349, *Damages* § 23.70c, as being an amount that should be fair and reasonable under all the circumstances. It should not be excessive, nor activated by passion and prejudice. It rests in the sound discretion of the fact-finders, and should be determined from all the evidence in the case. Devitt & Blackmar's *Federal Jury Practice and Instructions*, Vol. 2, Page 253, states that the amount of punitive damages "must be fixed with calm discretion and sound reason, and must never be awarded, or fixed in amount, because of any sympathy, or bias, or prejudice with respect to any party to the case.

(Continued on following page)

awarded against all defendants. We are, of course, aware that punitive damages awards are not favored by the law and are awarded only where willful and wanton conduct occurs. *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1973). We are also aware that under Ohio law there need not be "any mathematical relationship between the actual and punitive damages in a particular case." *Wood v. Stark Tri-County Building Trades Council*, 473 F.2d 272, 274 (6th Cir. 1973).

The punitive damages awarded here were, in some respects, excessive. Although we appreciate the district court's outrage at defendants' conduct, the truth is that this suit only seeks redress of one of dissident's wrongs. It is true that the incumbent leadership's earlier conduct against various dissidents can and should be taken into account in determining punitive damages. This earlier conduct demonstrates the malicious motivation behind the

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Footnote continued—

> While the plaintiff in argument has laid emphasis on the necessity of making punitive damages large enough in amount to be really painful to entities which possess great wealth, and this Court has been using the terms "punitive damages" and "smart money," it must not be overlooked that the basic reason for any use of punishment by our system of justice is not merely to cause the wrongdoer to suffer, but to deter wrongdoing; "to serve as an example or warning to others not to engage in such conduct" Devitt & Blackmar, *op. cit.* P. 202; "to make an example not only for the private good of the plaintiff, but for the public good, for the purpose of teaching other persons not to do likewise." 2 OJI 597, *Damages* § 259.29.
>
> It is also necessary to remember that if punishment is to deter the one punished, it must not be so severe that the memory of the wrongdoing will be blotted out by resentment over the pain of the punishment. Awards of millions against anyone no matter how wealthy, tend to raise in the minds of both the wrongdoer and the public the thought, not of deterrence, but that what is being done is being done because of what the wrongdoer is, rather than what he did.

beating of John Shimman.[45] However, the earlier conduct cannot itself be a basis for recovery. Indeed, most of the other clashes between John Frank, *et al.* and the dissidents did not involve John Shimman, they involved his brothers and other dissidents.

We also conclude that we should direct a remission of punitive damages on this appeal instead of remanding for a recomputation. In two recent cases, this court has recalculated damages on appeal instead of remanding. *Clissold v. St. Louis - S.F.Ry. Co.*, 600 F.2d 35 (6th Cir. 1979); *Drayton v. Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1978). Each of these cases was decided over strong dissent. As Judge Engel emphasized in *Drayton, supra,* "where, in a bench trial, an award of damages is found to be excessive, the preferred course is to refer the case back to the court which originally tried it for reconsideration." *Id.* at 366.

Nonetheless, as in *Drayton, supra,* we find this case appropriate for direct remission here. This case has been in the courts for over six years. Both sides deserve a final adjudication. The only damages we remit are punitive damages. We are in as good a position as the district court on this issue. We fully accept the court's finding of heinous behaviour. The data concerning the defendants' financial status is plain on the record. Thus, we need not weigh conflicting testimony. *See Gungman v. Western State Bank of Devils Lake,* 540 F.2d 948, 954 (8th Cir. 1976) (remission of punitive damages); *Texas Co. v. R. O'Brien & Co.*, 242 F.2d 526, 529 (1st Cir. 1957)

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45. Defendants claimed that this evidence was irrelevant and inadmissible. This argument is meritless. The evidence shows the motive or intent behind the beating as well as malice for punitive damages purposes. *See* F.R.E. 401, 402.

(remission of damages where record below is undisputed) *Cf. Petition of United States Steel Corp.*, 479 F.2d 489 (6th Cir.), *cert. denied*, 414 U.S. 859 (1973) (remission of damages after district court failed to recalculate damages properly on initial remand.)

A. John Frank

John Frank, of course, was the dissidents' main antagonist. The evidence supports the district court's determination that Frank instigated the beating of John Shimman. The district court assessed punitive damages at $75,000. John Frank's income in 1973, 1974 and 1975 was $22,106.00, $22,447.00 and $26,763.00 respectively. His net worth in 1975 was $28,000. We think that John Frank's conduct warrants imposition of punitive damages. We think that $75,000 is excessive. Given his financial situation, we believe that $20,000 is the maximum sum which should be awarded as a deterrent measure.

B. James Grothaus

James Grothaus knocked John Shimman to the floor. The district court also found that Grothaus was a ringleader in the plan to beat a dissident. The record supports this finding. The district court assessed punitive damages at $75,000. James Grothaus' income in 1972, 1973 and 1975 was $20,410.94, $27,454.64 and $43,601.00 respectively. His net worth in 1975 was $23,675.00. We also think that $75,000 is excessive. We believe that $20,000 is the maximum deterrent sum which should be awarded.

C. Terry Grothaus

Terry Grothaus kicked John Shimman several times after Shimman had been knocked to the floor. The district

court assessed punitive damages at $25,000. Terry Grothaus is a Vietnam veteran who suffered from epilepsy from head wounds. As a result he receives a government pension of $4,272.00 per year. In 1973, 1974 and 1975, Terry Grothaus earned $11,095.00, $9,468.00 and $10,414.00 respectively. These sums were in addition to his pension.

Terry Grothaus' conduct in kicking a defenseless man while he lay on the floor justifies an award of punitive damages. However, given his limited financial means, we think that $5,000 will accomplish the deterrent effect sought by the district court.

D. Local 18

Perhaps the most difficult judgment to be made concerns the liability of Local 18 for punitive damages. We have previously detailed the evidence which renders Local 18 liable for the conduct of John Possehl and John Frank. Local 18's assets are over $2,500,000. Thus, unlike the case of the individual defendants, this award is not, on its face, excessive. However, the ones who will end up paying for the punitive damages award are the union members. For this reason, courts should be slow to award huge punitive damages awards against unions.[46] *See Int'l Brotherhood of Elect. Workers v. Foust, supra.* The district court assessed punitive damages at $250,000. Keeping

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46. The Ohio Supreme Court has expressed similar concerns when discussing the liability of corporations for punitive damages:

> "[C]orporations may render themselves liable, by the malicious misconduct of their agents or servants while acting within the scope of their employment, to exemplary and punitive damages; but it is a doctrine capable of being greatly abused, and courts ought to be careful to see to it that it is not misapplied."

Logsdon v. Graham Ford, 54 Ohio St. 2d 336, 338, 376 N.E.2d 1333 (1978), *citing Pittsburg, Fort Wayne & Chicago R. R. Co. v. Slusser,* 19 Ohio St. 157, 162 (1869).

in mind the trial court's generous award of actual damages—which is likely to be collected from Local 18—we think that the punitive damages award, while warranted, is excessive. The sum of $100,000 should prove adequate to deter wrongdoing by local unions in Local 18's position.

VI. CONCLUSION

In conclusion, we reverse the finding of liability against the International Union and remand with directions to dismiss. We affirm the judgment of liability against all other defendants. We affirm the award of $107,873.99 actual damages, assessed jointly and severally against all defendants. We also affirm the award of $75,000 in attorney's fees against all defendants. We modify the award of punitive damages against Terry Grothaus from $25,000 to $5,000. We modify the award of punitive damages against James Grothaus from $75,000 to $20,000. We modify the award of punitive damages against John Frank from $75,000 to $20,000. We modify the award of punitive damages against Local 18 from $250,000 to $100,000. As modified, the judgment of the district court is affirmed. Each side will bear its own costs.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 20, 1981)

Case No. C 73-364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN C. SHIMMAN,
Plaintiff,

vs.

TERRY OLIVER GROTHAUS, *et al.*,
Defendants.

MEMORANDUM AND ORDER

YOUNG, *J.*:

This cause came to be heard upon the filing of an application for attorney's fees incurred in the appeal of this case, in the amount of $56,178.00. The application has been opposed by the defendants.

In its opinion of February 14, 1977, this Court held that plaintiff was entitled to recover attorney's fees in connection with the pendant state claim involving the intentional tort of assault and battery. This Court also recognized plaintiff's right to recover attorney's fees under the LMRDA where it is found that the defendant has acted with malice or in bad faith. As to the amount of the award, the parties stipulated that $75,000.00 would be a reasonable attorney's fee. The Court of Appeals affirmed this Court's authority to award attorney's fees

under the LMRDA and under state law, based on the District Court's finding that the defendants acted in bad faith. *Shimman v. John Frank,* 625 F.2d 80 (6th Cir. 1980). The Court also affirmed the amount of the award of attorney's fees based on the stipulation of the parties. Plaintiff now requests an additional $56,178.00 for attorney's fees incurred in defending the appeal.

Plaintiff's application raises the legal question of whether plaintiff is entitled to attorney's fees incurred in connection with defending the appeal in this case. After reviewing plaintiff's application and the defendants' memorandum in opposition, the Court requested that the parties rebrief several issues. *Shimman v. Grothaus,* No. C 73-364 (N.D. Ohio, filed Sept. 22, 1980). It is now possible to consider the issues raised by plaintiff's application. The Court will first consider the effect of the Court of Appeals' mandate which specified that each party shall bear its own costs, and then determine whether the court has the discretionary power to award attorney's fees incurred in connection with defending the appeal in this case.

I. THE COURT OF APPEALS' MANDATE

The Court of Appeals' mandate provided that "[e]ach side will bear its own costs." *Shimman v. Frank,* 625 F.2d 80, 104 (6th Cir. 1980). Clearly, if this language is determinative as to the question of attorney's fees, then this Court has no authority to consider the present application.

The defendants claim that the term "costs," as used by the Court of Appeals, includes attorney's fees awards. Their first contention is that the language of 42 U.S.C. §1988 explicitly allows "attorney's fees as part of costs." Secondly, they note that under the traditional "American

Rule" reasonable attorney's fees are not ordinarily awardable to the prevailing party in the absence of statutory authorization. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

The plaintiff argues, *inter alia*, two convincing propositions: first, that the discretion to award fees is normally within the province of district courts and, therefore, the failure of the Court of Appeals to make explicit mention of attorney's fees leaves the matter with the district court; and, second, that distinctions between fees and costs preclude the Court from concluding that a mandate regarding "costs" is determinative as to the awarding of attorney's fees.

The plaintiff contends that the failure of the Court of Appeals to make explicit mention of attorney's fees leaves the matter open to the district court. See *Perkins v. Standard Oil Co. of Calif.*, 399 U.S. 222 (1970). Generally, determining fee awards is a function of the district courts and not the Court of Appeals.[1] The Court of appeals, however, routinely assesses costs pursuant to Rule 39 of the Federal Rules of Appellate Procedure. Without explicit directions to the contrary, this Court will not presume that a portion of the mandate apparently made pursuant to Rule 39 should apply to a function traditionally determined by the district courts.

Plaintiff also contends that distinctions between fees and costs preclude the Court from concluding that the

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1. "Services relating to the various appeals taken in this case are compensable, and the district court, with its greater facility for evidentiary hearings and factfinding, should make awards for appellate services in the first instance, subject to our view." *Northcross v. Board of Education of Memphis City Schools*, 611 F. 2d 624, 637 (6th Cir. 1979).

Court of Appeals' mandate regarding "costs" is determinative as to potential awards of attorney's fees.[2]

> "[T]here are several distinctions between attorneys' fees and out-of-pocket costs. Whereas out-of-pocket costs are routinely awarded upon submission of a bill of costs, a much more elaborate documentation process is required with respect to attorneys' fees. And whereas Court costs may only be taxed after entry of final judgment, attorneys' fees may be assessed even if an action is settled and no final judgment is entered. Indeed, it is interesting that even though §1988 defines attorneys' fees as part of costs, Courts have, for purposes of analysis, consistently separated attorneys' fees and other costs.
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> * * * * *
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> As we have already stated, by defining attorneys' fees as part of costs, Congress was merely concerned with problems of immunity and did not intend for attorneys' fees to be treated as part of costs for all purposes. Moreover, the legislative history of §1988 emphasizes the need in civil rights cases for adequate attorneys' fee awards. On the other hand, there is nothing in the legislative history of §1988 which even remotely suggests that the treatment of out-of-pocket costs should in any way change as a result of the enactment of §1988." *Gates v. Collier*, 616 F. 2d 1268, 1279 fn 17 (5th Cir. 1980) (citations omitted) (attorney's fees awarded pursuant to §1988 are not governed by the general rule against allowing interest on costs).

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2. In *Northcross v. Board of Education of Memphis City Schools, supra*, attorney's fees were separated from costs for both analytical and practical purposes.

Indeed, while costs are assessed as *part* of a final judgment, attorney's fees are ordinarily awarded upon application *because* of a final judgment. See *McDonald v. Oliver,* 525 F. 2d 1217, 1226 (5th Cir. 1976) (awards of attorney's fees under the LMRDA are ancillary to the primary claim).

In light of the previous discussion, this Court finds that the mandate of the Court of Appeals concerning costs does not address attorney's fees.

II. THE COURT'S DISCRETIONARY POWER TO AWARD ATTORNEY'S FEES

The Court's earlier award of attorney's fees was made pursuant to the LMRDA, where it was found that the defendant acted with malice or in bad faith, and the pendant state claim involving the intentional tort of assault and battery. The plaintiff's request for an award of fees in connection with his defense of the appeal raises the two bases previously utilized by the Court as well as two other potential sources of authority: first, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988; and, second, the "common benefits" rationale of *Hall v. Cole,* 412 U.S. 1 (1973), for a violation of the Landrum-Griffin Act.

The Court will first consider whether it has the authority to make an award of attorney's fees in connection with an appeal under the LMRDA where a district court had found that the union acted maliciously or in bad faith. The Court of Appeals supported the earlier "award of attorney's fees because of the defendants' malicious conduct." *Shimman v. Frank,* 625 F. 2d at 101.

Courts have awarded attorney's fees in connection with LMRDA appeals. See *Hall v. Cole,* 376 F. Supp. 460

(E.D.N.Y. 1974); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968). The expenses of defending an appeal where the defendants "challenged every finding of fact and conclusion of law made by the district court," 624 F. 2d at 88, can be a heavy financial burden on an individual union member. Cf. *Hall v. Cole, supra*, 412 U.S. at 13.

The defendants' all-encompassing appeal failed to affect the Court's award of actual damages and attorney's fees and only modified the amount of punitive damages awarded. In spite of the "shotgun" nature of the appeal, the essence of this Court's judgment remained very much intact. Thus, the Court finds that the plaintiff was a "prevailing party" on appeal.[3] Accordingly, this Court, in its discretion, will award the plaintiff attorney's fees in connection with the appeal.

In light of the Court's finding that attorney's fees are both authorized and appropriate, it is not necessary at this time to consider whether the other three proposed bases may authorize an award in connection with this appeal.

III. THE AWARD

The plaintiff requests $56,178.00 for attorney's fees. While the defendants opposed the application from a legal standpoint, they do not question that the amount represents a reasonable award. As there is no opposition to quantum of the award, the Court will accept this figure as reasonable.

THEREFORE, for the above stated reasons, good cause appearing, it is

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3. Although the amount of punitive damages was reduced, the Court of Appeals "fully accept[ed] the court's finding of heinous behavior. 625 F. 2d at 102.

ORDERED that judgment be rendered for the plaintiff in the amount of $56,178.00 for attorney's fees assessed jointly and severally against all defendants.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Sr. United States District Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed May 11, 1982)

Case No. C 73-364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN C. SHIMMAN,
Plaintiff,

vs.

TERRY OLIVER GROTHAUS, *et al.*,
Defendants.

MEMORANDUM AND ORDER

YOUNG, *J.*:

This matter is before the Court upon the defendants' motion for new trial and motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(a) and (e) and defendants' motion to stay execution of judgment pursuant to Federal Rule of Civil Procedure 62(b). Both motions have been opposed by the plaintiff.

This is an action concerning a suit filed by a dissident union member who was beaten at a union meeting and, subsequently, filed suit against three individuals, the local, and the international union. Judgment was rendered for the plaintiff and affirmed by the Sixth Circuit. An award of attorney's fees was made with reference to the trial, and the parties stipulated to a reasonable amount. This motion only involves this Court's October 20, 1981 award of at-

torney's fees to the plaintiff in the amount of $56,178.00 for defending the appeal before the Sixth Circuit Court of Appeals.

A brief review of the procedural background which preceded the court's award will be instructive. On July 28, 1980, the plaintiff filed an application for additional attorney's fees for time spent by plaintiff's counsel for on the appeal. The accompanying memorandum of law was brief, although nearly one-half of it directly addressed the question of the quantum of fees, including a summary and expression of its reasonableness. More importantly, the memorandum was supplemented with two affidavits wherein plaintiff's attorneys swore that the hours and fees specified were correct, necessary and reasonable. Finally, plaintiff's counsel attached as an exhibit xeroxed copies of its exhaustive records, substantiating the totals claimed. These records were sworn to be true and kept in the usual course of business. (Affidavit of Cary Rodman Cooper.) The defendants filed a memorandum in opposition to plaintiff's application for additional attorney's fees on August 20, 1980. This memorandum *only* addressed questions related to the issue of whether this court could grant additional attorney's fees for plaintiff's counsel's efforts in defending the appeal. The defendants asked that the court deny the application and no mention was made of the reasonableness of the request.

After receiving the memoranda, the matter was decisional and the Court could have ruled on the motion. No request had been made for an evidentiary hearing, and the factual presentations within the fee application were not challenged, although this was unremarkable in light of plaintiff's extensive submission of records and selection of hourly rates which were, if anything, modest. The defendants' sole defense to the application for fees concerned

plaintiff's right to recover. In light of the complexity of this issue, the Court stated the following in a memorandum and order filed on September 22, 1980:

> This Court finds that the plaintiff's right to recover attorney's fees for the time spent on appeal presents a difficult question under the circumstances of the present case. This question should not be resolved without careful consideration of the relevant case law and authorities. This Court is unwilling to decide this question on the basis of the brief memoranda filed by counsel. Thus, this Court requests that the parties rebrief the attorney's fees issue as outlined in this order.
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> In responding to this order the parties should also consider the effect of the mandate issued by the Court of Appeals in the present case. In the mandate the Court of appeals has specified the amounts of compensatory and punitive damages and attorney's fees. The Court of appeals has also stated that each party shall bear its own costs on appeal. In light of the decision of the Court of appeals, it must be determined whether this court now has authority to award additional attorney's fees incurred by plaintiff in defending the appeal.

Clearly, the memorandum and order did not request further briefing on the quantum of fees, as plaintiff had provided extensive materials on this matter by affidavit and these assertions had not been put into issue.

Upon the court's request, the parties provided well-reasoned briefs on the remaining issue. At this time, it was apparent that the defendant had not questioned the quantum of the requested fees; plaintiff's memorandum

filed pursuant to the Court's order of September 22, 1980 noted the obvious: "Local 18 does not, however, challenge the method by which plaintiff computed the fees." In defendant's supplemental memorandum of law filed after the plaintiff's memorandum, no mention was made regarding the quantum of the award. Nearly a year passed before the Court filed its order granting attorney's fees and the defendants continued to recognize the issue now being challenged. Finally, on October 20, 1981, the Court granted plaintiff's application in the amount requested. With respect to the amount of the award, this Court found that "[w]hile the defendants opposed the application from a legal standpoint, they do not question that the amount represents a reasonable award. As there is no opposition to the quantum of the award, the Court shall accept this figure as reasonable."

The defendants seek relief from this award, contending "that this Court erred in its October 20, 1981 Order by finding that defendants did not or do not challenge the quantum of the award. The court has mistakenly denied the defendants the opportunity to challenge the quantum of the award." Defendants' Motion for New Trial and Motion to Alter or Amend Judgment, at 1-2, filed October 30, 1981. Essentially, the defendants contend that the Court erred as it "never provided the defendants with the opportunity to conduct an evidentiary hearing or brief the issue of the quantum of the amount of the plaintiff's post-trial attorney's fees incurred in the appeal of the case." Defendants' Motion for New Trial and Motion to Alter or Amend Judgment, at 3. Additionally, the defendants cite the Court's request for rebriefing, concerning only the question of the legal authority to award fees, as further proof that the matter was never properly considered by the Court.

The defendants' arguments are easily disposed of. If the defendants failed to question the amount of the application, it was either by choice or neglect. Never before in this Court's experience has a party opposing the amount of fee award failed to challenge sworn statements and records concerning the amount of a requested fee award. The fact that the defendants stipulated to an amount in the first fee request further indicates that they should be aware that the quantum of the award would be at issue.

The proper practice for the filing and opposing of motions is put forth in Local Rule 3.01:

> (1) Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments of motions will be permitted on application and proper showing.
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> * * * * *
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> (2) Each party opposing the motion shall serve and file within ten (10) days thereafter a brief written statement of reasons in opposition to the motion and a list of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all documentary evidence and photographs which he intends to submit in opposition to the motion in addition to the affidavits required or permitted by the Federal Rules of Civil Procedure.

The Local Rules clearly indicate that, unless an application for a hearing is made, motions are to be decided upon the submission of papers. Had the defendants practiced within the language of the Rules, they would have challenged in the memorandum in opposition the underlying factual matters put forth by affidavit and, if they so chose, requested oral arguments.

This Court was within its authority to decide the quantum of fees on the basis of the motion papers. *Bagby v. United States,* 199 F.2d 233 (8th Cir. 1952). Indeed, the Court is faced with this same type of situation where motions for summary judgment and motions to dismiss for lack of *in personam* jurisdiction are accompanied by sworn affidavits, the substance of which are not opposed.

In this matter, the defendants failed to oppose what was essentially one-half of the motion. The defendants had every opportunity to raise their objections which now become apparent through hindsight. Even the most simple case contains many potential issues - it is the district court's duty to resolve matters as they *are* put into issue, not to usurp the litigant's role of determining which portions of a complaint, motion, or application *will be* contested and put into issue. Based upon the preceding analysis, the defendants' motion for new trial and motion to alter or amend judgment is not well taken and will be denied.

In light of the Court's present disposition of the above motions, the defendants' motion to stay execution of judgment may now be dismissed as moot.

THEREFORE, for the above stated reasons, good cause appearing, it is

ORDERED that the defendants' motion for new trial and motion to alter or amend judgment be, and it hereby is OVERRULED: and it is

FURTHER ORDERED that the defendants' motion to stay execution of judgment pursuant to Federal Rule of Civil Procedure 62(b) be, and it hereby is, DISMISSED AS MOOT.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Sr. United States District Judge

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 21, 1983)

No. 82-3370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. SHIMMAN,
Plaintiff-Appellee,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Defendant-Appellant.

APPEAL from the United States District Court for the Northern District of Ohio.

Before: KEITH and MERRITT, *Circuit Judges,* and ALLEN, *District Judge.**

ALLEN, *District Judge,* delivered the opinion of the Court in which KEITH, *Circuit Judge,* concurred. MERRITT, *Circuit Judge,* (pp. 5-6) delivered a separate dissenting opinion.

ALLEN, *District Judge.* This appeal challenges the district court's award of attorneys' fees to the plaintiff-appellee for services rendered during the 1980 appeal of the underlying claim.

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*The Honorable Charles M. Allen, Chief Judge, United States District Court for the Western District of Kentucky, sitting by designation.

The complaint was filed pursuant to 29 U.S.C. § 412 alleging malicious assault and beating of appellee by three individuals who were members of appellant Local 18, in violation of § 101 of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411. The complaint also alleged violations of 42 U.S.C. §§ 1985(3) and 1986. It also set forth a claim under Ohio Common Law for assault and battery.

The district court dismissed the civil rights claims but upheld the Landrum-Griffin and Ohio Common Law claims. Judgment was entered by the district court awarding appellee $107,067.99 in compensatory damages and $675,000 in punitive damages. Also, a fee award of $75,000 was granted which the parties stipulated was reasonable but the appellant contested the question of whether they should have been awarded. On the appeal, the court affirmed the imposition of liability against all defendants except the International Union and affirmed the award of compensatory damages and attorneys' fees in full. The punitive damages award against the three individual defendants and against Local 18 were substantially reduced. See *Shimman v. Frank, supra.*

Following the decision of this court, Shimman filed an application for additional fees in the district court. He sought $56,178 as attorneys' fees for the work his counsel performed during the 1980 appeal. The application was documented and supported by a memorandum of law and affidavits. The appellants contested the court's authority to issue an award but did not challenge the amount claimed. The district court then filed its opinion awarding Shimman the additional attorneys' fees in the amount requested.

The appellant argues that only the Court of Appeals can make an award of attorneys' fees for services rendered in that court. The decision of this court in *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d 624 (1979), reh. denied January 17, 1980, holds that district courts are ordinarily the preferable forum to determine attorneys' fees for services rendered on appeal because of their superior access to fact-finding procedures. In light of *Northcross* and *Rodriguez v. Taylor,* 569 F.2d 1231 (3rd Cir. 1977), *cert. denied,* 436 U.S. 913 (1978), appellants' contention in this regard is without merit.

Appellant also contends that since its appeal was taken in good faith, there is no authority for levying a fee award against it under the bad faith rationale. This argument overlooks the language of the Supreme Court in *Hall v. Cole,* 412 U.S. 1 (1973), which states, in essence, that bad faith may be found not only in the actions that lead to a lawsuit but also to the conduct of the lawsuit. See p. 15. In the case at bar, it is the bad faith that led to the lawsuit which prompted the Court of Appeals on the original appeal to award fees.

Since there was bad faith in the matters that led to the lawsuit, the purposes of fee-shifting which are warranted where there is bad faith can be completely served only when the plaintiffs secure an award for attorneys' fees at both the district and the appellate court levels. To deny the appellee a fee at the appellate court level would only partially shift the fee burden to the appellants. and would defeat the essential purpose of the bad faith exception to the general American rule that prevailing parties cannot recover their attorneys' fees. See *Hall v. Cole,* 376 F.Supp. 460 (E.D. N.Y. 1974).

Argument is made that this court, by directing costs to be borne by the parties on the first appeal, meant to preclude the appellee from recovering any attorneys' fees for services rendered on that appeal. That argument is resolved by holding that this court was not presented with any issue as to attorneys' fees to be granted for services upon the first appeal when it entered its order directing the sharing of costs. While the entry of an order directing the sharing of costs under Rule 39(a), Federal Rules of Appellate Procedure, has significance in cases arising under 42 U.S.C. § 1988, where the only grounds upon which an attorney's fee may be awarded is as part of the costs, such is not the case here where the fees were awarded under the bad faith rule theory.

We, therefore, hold that the district court had authority to award fees for services rendered upon the first appeal, and that Rule 39(a) and the previous order of the Court directing the parties to bear their own costs constitutes no bar to the award.

Finally, appellants contend that there should have been an evidentiary hearing with respect to the amount of attorneys' fees to be awarded. The problem with that contention is that appellant at no time requested a hearing by local rules, nor did it oppose the amount of fees requested by appellee. The only objection, and the one that it has preserved on appeal, is that District Judge Don Young had no authority to enter a fee award of any amount. Given these facts, there was no error upon the part of Judge Young in refusing to alter or amend his findings concerning the attorneys' fees, or to grant the appellant a new trial on that issue.

The court observes for the benefit of the parties that this is the final award of attorneys' fees which will be made in this case.

The judgment of the district court granting attorneys' fees is hereby AFFIRMED.

MERRITT, *Circuit Judge*, dissenting. Without a hearing or any rationale that I can understand, the District Court awarded plaintiff over $50,000 in attorney's fees as costs for handling the prior appeal in this Court. The District Court did so in the face of our prior disposition of the case in which we ordered that each party should bear his own costs.

This action is not a suit in equity. It is an action at law for battery. No statute authorizes attorney's fees in such cases, and it is clear that there is no American common law tradition which supports an award of attorney's fees in such cases. *See Alyeska Pipeline Services Co. v. Wilderness Society*, 421 U.S. 240 (1975). Moreover, even if authority existed for such an award, attorney's fees are awarded only as a part of costs, and this Court has already spoken on this issue in its earlier disposition when it declined to award appellate costs to plaintiff and ordered each party to bear his own costs. Thus, the award of attorney's fees in this case is without precedent or authority and is directly contrary to a prior order of this Court.

The Court does not articulate any recognized theory for the award of attorney's fees. The plaintiff has not created a common fund for the benefit of others, and the defendants are not accused of bad faith in the conduct of the litigation either in the District Court or in this Court. Indeed, the defendants succeeded in getting the District Court judgment reversed in part in the appellate proceeding in which plaintiff is now being awarded fees. So far as I am aware, this is the first case brought at law in the Sixth Circuit in which a party, in the absence of statute, has received attorney's fees simply because of

wrongful conduct unconnected with the trial itself. An award of attorney's fees in this case undermines the "American approach [to attorney's fees] founded on the egalitarian concept of providing relatively easy access to the courts to all citizens and reducing the threat of liability for litigation expenses as an obstacle to the commencement of a lawsuit or the assertion of a defense that might have some merit." 10 WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE § 2665, p. 172 (1983).

In addition, after the first appeal, this Court declined to award plaintiff his costs. After reversing in part the judgment of the court below in favor of plaintiff, this Court ordered that each party should pay his own costs. The majority does not now suggest any reason for reversing the previous decision of this Court on costs. I would adhere to the previous decision, and I therefore respectfully dissent.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT GRANTING REHEARING EN BANC

(Filed December 5, 1983)

No. 82-3370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. SHIMMAN,
Plaintiff-Appellee,

vs.

INTERNATIONAL UNION OF ENGINEERS, LOCAL 18,
Defendant-Appellant.

ORDER

A majority of the Judges of this Court in regular active service have voted for rehearing of this case en banc. Sixth Circuit Rule 14 provides as follows:

> The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.

Accordingly, it is ORDERED that the previous decision and judgment of this Court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will direct the parties to file supplemental briefs and will schedule this case for oral argument as soon as practicable.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed October 24, 1984)

Case No. C 73-364

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JOHN C. SHIMMAN,
Plaintiff,

vs.

TERRY OLIVER GROTHAUS, *et al.*,
Defendants.

ORDER

YOUNG, *J*:

This cause is before the Court upon the Sixth Circuit Court of Appeals' en banc decision filed October 1, 1984, that this Court's award to plaintiff Shimman of the attorney fees incurred in appeal of this cause be reversed and remanded.

This Court, on October 20, 1981, determined that plaintiff was entitled to an award of $56,178.00 as the amount of attorney fees incurred in connection with defending the appeal in this case. This decision was affirmed by a divided panel of the Sixth Circuit Court of Appeals. *Shimman v. International Union of Operating Eng'r, Local 18*, 719 F.2d 878 (6th Cir. 1983). The panel decision there-

after was vacated on December 5, 1983, and the Court of Appeals granted an en banc rehearing of the matter. The en banc court held that none of the theories propounded by plaintiff justified the attorney fee award for the appeal in this cause. It thereafter reversed this Court's judgment and remanded, "with directions to enter an order denying attorney fees." *Shimman v. International Union of Operating Eng'r, Local 18*, No. 82-3370, slip op. at 22 (6th Cir. Oct. 1, 1984).

THEREFORE, for the above stated reasons, good cause therefor appearing, it is

ORDERED that this Court's October 20, 1981, attorney fee award of $56,178.00 to plaintiff Shimman should be, and it hereby is, VACATED; and it is

FURTHER ORDERED that plaintiff Shimman's application for attorney fees incurred in the appeal of this cause should be, and hereby is, DENIED.

IT IS SO ORDERED.

/s/ DON J. YOUNG
Sr. United States District Judge

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 1, 1984)

No. 82-3370

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN C. SHIMMAN,
Plaintiff-Appellee,
v.
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Defendant-Appellant.

Before: LIVELY, *Chief Judge;* EDWARDS, ENGEL, KEITH, MERRITT, KENNEDY, MARTIN, CONTIE, KRUPANSKY and WELLFORD, *Circuit Judges.*

JUDGMENT

ON APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same

is hereby reversed and the case is remanded with directions to enter an order denying attorney fees.

It is further ordered that Defendant-Appellant recover from Plaintiff-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

STATUTES INVOLVED

29 U.S.C. § 411

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and asembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

29 U.S.C. § 412

§ 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

42 U.S.C. § 1985

* * * * *

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy

set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(3)

Supreme Court, U.S.
FILED
JAN 31 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1043

In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,
Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit correctly interpreted this Court's prior decisions in regard to the "bad faith" exception to the American Rule and properly applied such decisions to deny petitioner's request for attorney fees for services rendered on appeal, as supported by a majority of the circuits?

2. Whether the Sixth Circuit correctly held that the "common benefit" exception to the American Rule is inapplicable in the present action because petitioner's "catalyst" failed to confer a substantial benefit to a recognizable class?

3. Whether the Sixth Circuit correctly determined that petitioner's civil rights claims under §§1985(3) and 1986 were insubstantial absent the requisite racially discriminatory intent?

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No. 84-1043

In the Supreme Court of the United States

October Term, 1984

JOHN C. SHIMMAN,

Petitioner,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

In 1972, Petitioner commenced this action in the United States District Court for the Northern District of Ohio, Western Division. On October 16, 1975, the District Court rendered judgment on behalf of petitioner (*See* Petition, p. 3). Damages were subsequently awarded on February 14, 1977 (*See* Petition, p. 4).

On May 21, 1980, the United States Court of Appeals for the Sixth Circuit partially reversed the judgment of the District Court and remanded the case with directions to dismiss the action against the International Union. The court also affirmed the judgment of liability against all other defendants, reduced the amount of damages awarded, and awarded attorney fees for work done at trial (*See* Petition, p. A89).

Pursuant to petitioner's request, on October 20, 1981, the District Court awarded petitioner additional attorney fees for services rendered on appeal (*See* Petition, p. 5).

On May 11, 1982, the District Court denied respondent's Motion for a New Trial or to Amend Judgment, and on October 21, 1983, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's award of attorney fees (*See* Petition, p. 5).

On December 5, 1983, the United States Court of Appeals for the Sixth Circuit granted a rehearing *en banc*, and on October 1, 1984, the Appeals Court reversed the decision of the District Court and remanded the case to enter an order denying attorney fees for work done on appeal.

On October 24, 1984, the District Court entered an order vacating the award of attorney fees.

JURISDICTION

Petitioner filed a Petition for Writ of Certiorari within 90 days of October 1, 1984, pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

Petitioner maintains that the following statutes are applicable:

29 U.S.C. §§411(a)(1) and 411(a)(2);

29 U.S.C. §412;

42 U.S.C. §1985(3);

42 U.S.C. §1986;

42 U.S.C. §1988.

STATEMENT OF THE CASE

In 1972, appellee John C. Shimman [hereafter "Shimman"] filed suit in the United States District Court for the Northern District of Ohio, Western Division [hereafter "District Court"] against appellant International Union of Operating Engineers, Local 18 [hereafter "Local 18"], the International Union of Operating Engineers, AFL-CIO [hereafter "International Union"] two members and an individual officer of Local 18. Shimman alleged violations of Sections 411(a)(1) and (2) of the Labor-Management Reporting Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §411(a)(1) and (2), Sections 1985(3) and 1986 of the Civil Rights Act of 1881 [hereafter "Civil Rights Act"], 42 U.S.C. §1985(3) and §1986, and the Ohio common law tort of assault and battery.

In 1975, the District Court, sitting without a jury, rendered judgment against all defendants on Shimman's claims under the Landrum-Griffin Act and on the pendent claim

of assault and battery.[1] After the trial on the issue of damages, the District Court entered judgment against all defendants, awarding Shimman $107,067.99 in compensatory damages and $675,000 in punitive damages against the various defendants. Additionally, the District Court awarded attorney fees in the amount of $75,000.

All defendants appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit

---

1. The District Court dismissed Shimman's claims under 42 U.S.C. §§1985(3) and 1986:

> Nevertheless, the Court does not believe that it is necessary to strain the meaning of §1985 in order to grant relief to the plaintiff. That statute was enacted a long time ago, to deal with problems which, while they still exist, are clearly within its compass. §411 is strong enough to stand on its own feet. It is not necessary to resort to §1985 to give it force. It is perhaps arguable that it was necessary to enact §411 because §1985 was not intended to, and did not, cover the areas of our society with which §411 deals.
>
> *The Court concludes that the plaintiff has no right to recover against the defendants or any of them under the provisions of Title 42 U.S.C. §1985.*
>
> III. Plaintiff's Third Cause of Action
>
> The Court's conclusion as to plaintiff's second cause of action seems to be dispositive of his third cause of action. Title 42 U.S.C. §1986 is specifically confined to relief against persons who were aware of conspiracy to violate §1985, and having the power to prevent any wrongdoing, neglected or refused to do so. Since the Court has found that there was no showing of a conspiracy in violation of §1985, *the plaintiff's claims under §1986 must fail* (emphasis added).

In its Opinion of February 14, 1977, the Court again emphasized that none of the relief granted was based in any part on Shimman's §§1985 and 1986 claims:

> The defendants suggest that under *Alyeska Pipeline Service Co. v. The Wilderness Society*, 421 U.S. 240 (1975), the plaintiff is not entitled to recover attorney fees. That decision, which has since been reversed by the Congress, deals with the so-called "private attorney general" concept in civil rights actions. This Court has never accepted that concept, but even if it had, in this case it has dismissed the plaintiff's civil rights claims.

in *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) (hereafter referred to as "the 1980 appeal"). A three judge panel reversed the imposition of liability against the International Union and significantly reduced by $150,000 the amount of punitive damages awarded against the remaining defendants. Notably, the Sixth Circuit ordered that each party bear its own costs, and remanded the case to the District Court for the execution of judgment.

Following the Sixth Circuit's decision, Shimman filed an application for additional fees in the District Court, seeking $56,178 as attorney fees for the work his counsel performed during the 1980 appeal. Although respondent contested the District Court's authority to issue such an award, District Court Judge Young filed an opinion awarding Shimman the additional attorney fees in the amount requested.

On October 30, 1981, Local 18 moved for a new trial or to amend judgment pursuant to Rule 59(a) and (e) of the Federal Rules of Civil Procedure. The District Court denied Local 18's Motion for New Trial on May 11, 1982. On June 4, 1982, Local 18 timely filed its Notice of Appeal and oral argument was held in the summer of 1983.

In a 2-1 opinion rendered on October 21, 1983 [hereafter "the 1983 panel decision"], a three judge panel of the Sixth Circuit held that the District Court had the authority to award attorney fees for time expended on the 1980 appeal, concluding that Rule 39(a) of the Federal Rules of Appellate Procedure and the previous order of this Court directing the parties to bear their own costs constituted no bar to the award. *Shimman v. International Union of Operating Engineers, Local 18*, 719 F.2d 879 (6th Cir. 1983).

More importantly, in that opinion, the majority rejected as without merit appellant's contention that only the court of appeals can make an award of attorney fees for services rendered in that court, citing *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (1979), *cert. denied*, 436 U.S. 913 (1978). Furthermore, the majority concluded that under the "bad faith" rationale enunciated in dicta in *Hall v. Cole*, 412 U.S. 1 (1973), Shimman was entitled to an award of attorney fees at both the district and appellate court levels.

In a strong dissenting opinion, Circuit Judge Merritt contended that the majority had failed to articulate any recognized theory to support the award of attorney fees, and that an award of attorney fees for services rendered on appeal in this particular instance was in direct contravention of the court's prior order that each party should bear its own costs. Moreover, Judge Merritt stated that this was the first case brought in the Sixth Circuit in which a party, in the absence of statute, has received attorney fees simply because of wrongful conduct unconnected with the trial itself.

Based on a determination that the panel decision was contrary to previous decisions of the Sixth Circuit, that consideration by the full Court was necessary to maintain uniformity of decisions in the Sixth Circuit, and based on the determination that this matter involved several questions of exceptional importance, respondent timely filed on November 4, 1983, a Petition for Rehearing En Banc. Respondent again contended that the District Court was precluded as a matter of law from awarding attorney fees for work done on appeal absent a finding of bad faith in the conduct of the litigation; Local 18 also contended that the Sixth Circuit's 1980 mandate that "each side will bear its own costs" implicitly resolved

in its favor the issue of attorney fees incurred in the appeal.

On December 5, 1983, the Sixth Circuit entered its order granting a rehearing of this case *en banc*, and subsequently reversed the attorney fee award on October 1, 1984. Petitioner, upon filing the Petition for Writ of Certiorari, seeks review of the October 1, 1984 *en banc* judgment rendered by the Sixth Circuit.

REASONS FOR DENYING THE WRIT

A. Introduction

There is an absence of both a substantial conflict among the circuits regarding exceptions to the American Rule,[2] as well as an important question under 42 U.S.C. §1988, and therefore, a decision by the Supreme Court in this matter is unnecessary. The Sixth Circuit's decision is supported by the other circuits overall, and the decision clarifies many of the cases cited by petitioner to be in opposition to the position taken by the Sixth Circuit.

Petitioner contends that the Sixth Circuit's holding that the "bad faith" exception to the American Rule against awarding attorney fees only includes bad faith either in bringing an action or during the course of the litigation, contravened decisions in all other federal circuits. The petitioner, however, misconstrues the holding completely. The issue in the present case does not involve an award

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2. The American Rule is a statement of a longstanding policy that attorney fees are not ordinarily recoverable absent a statute or an enforceable contract providing for such fees. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967). The rule was adopted by this Court in *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).

of attorney fees for services rendered at the trial level, but rather is an attempt to determine whether there can be an attorney fee award for appellate work. The Sixth Circuit held that: (1) "the 'bad faith' exception to the American Rule does not allow an award of attorney fees based only on bad faith in the conduct giving rise to the underlying claim," therefore precluding an award of attorney fees for work done on appeal; (2) the "common benefit" exception to the American Rule is inapplicable in the instant action; (3) the petitioner's civil rights claim was insubstantial; and (4) there could be no award of attorney fees for appellate work under Ohio law regarding the pendent assault and battery claim. The Sixth Circuit correctly interpreted this Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) and recognized that the "common benefit" exception to the American Rule is inapplicable in the present action.[3]

B. The Sixth Circuit Correctly Interpreted This Court's Prior Decision in Holding That the "Bad Faith" Exception to the American Rule Does Not Permit Attorney Fees on Appeal for Acts Giving Rise to the Litigation

The longstanding American Rule is firmly embedded in American jurisprudence, and has been regularly reaffirmed by the Supreme Court in numerous decisions.

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3. Petitioner's contention that the law of the case doctrine precluded the Sixth Circuit from considering whether the "bad faith" exception applies to bad faith during the course of the litigation was correctly rejected; as the Sixth Circuit stated, the law of the case doctrine does not preclude an *en banc* court from overruling any panel decision. *See Van Gernert v. Boeing Co.*, 590 F.2d 433, 436-37 n.9 (2d Cir. 1978)(*en banc*), *aff'd on other grounds*, 444 U.S. 472 (1980) and *In Re Central R. Co.*, 485 F.2d 208, 210-11 (3d Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1131 (1974), as cited in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (*en banc*).

Hensley v. Eckerhart, 461 U.S. 424 (1983); *Summit Valley Industries v. Local 112, United Brotherhood of Carpenters*, 456 U.S. 717 (1982); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). The systematic and long-term adherence to the rule can be attributed primarily to its strong underlying rationale that:

> . . . one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel.[4]

Several narrow exceptions have been judicially carved out of the American Rule, including the "bad faith" exception[5] and the "common benefit" theory.[6] This Court's decision in *Hall v. Cole*, 412 U.S. 1 (1973) is cited by petitioner as setting forth the present day formulation in LMRDA cases of a pre-litigation "bad faith" exception for awarding attorney fees, although the award in *Hall* was firmly based on the "common benefit" rationale. *Hall* involved a suit brought by a Union member under §412 of the LMRDA to challenge his expulsion from Union membership. This Court held that by vindicating his own right to free speech, the Union member rendered a sub-

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4. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, at 718 (1967).

5. The "bad faith" exception to the American Rule allows attorney fees in cases in which the opposition has acted in bad faith. Although the limits to the "bad faith" exception had not been clearly defined, the Sixth Circuit maintained that the only bad faith existing in the present action was bad faith in the acts giving rise to the claim and held that the "bad faith" exception only allowed an award of attorney fees for bad faith during the course of the litigation. *Shimman*, 744 F.2d at 1230.

6. The "private attorney general" exception was essentially overruled by this Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

stantial service or "common benefit" to the Union as an institution, and to all of its members.[7] The Sixth Circuit's well reasoned opinion explained the "bad faith" exception, cited in this Court's dictum in *Hall*:

> Thus, it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 6 J. Moore, Federal Practice ¶54.77 [2], p. 1709 (2d Ed. 1972); *see, e.g. Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4 (1968); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (CA4 1963); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (CA4 1951). In this class of cases, the underlying rationale of "fee shifting" is, of course, punitive, and the essential element in triggering the award of fees is therefore the existence of "bad faith" on the part of the unsuccessful litigant.

As the Sixth Circuit also noted, in MOORE'S FEDERAL PRACTICE the explanation is preceded with "where an unfounded

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7. The term "common benefit" as used in this context has come to mean that a substantial benefit conferred on an ascertainable class, and therefore, the cost of obtaining that benefit, such as attorney fees, should be spread among the entire class on a proportional basis. The lower courts correctly decided that the "common benefit" theory is inapplicable in this action because the petitioner only sought redress of his own wrongs, as opposed to those of an entire class.

Furthermore, petitioner incorrectly contends that this Court cited two Fourth Circuit cases in *Hall* that awarded fees due to bad faith conduct giving rise to the litigation. *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494 (4th Cir. 1963) and *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473 (4th Cir. 1951). The Sixth Circuit correctly recognized that the *Rolax* court's award of attorney fees where there was also an award of injunctive relief which benefitted all minority firemen employed by the railroad, was based on a common benefit type of rationale, although the label "common benefit" was not specifically coined until this Court's decisions in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) and *Hall v. Cole*, 412 U.S. 1 (1975).

action or defense is brought or maintained . . .". The *Hall* decision was clearly not based on any "bad faith" exception.

The petitioner incorrectly relies on a statement taken out of context in an attempt to establish that this Court expanded its decision in *Hall* to include a pre-litigation "bad faith" exception. The full statement in *Hall* is as follows:

> Petitioners also contend that the award of attorneys' fees in the case was improper because the District Court, in denying respondent's claim for punitive damages, found that "defendants, in good faith, believed that they had a right to charge and discipline [respondent] for his actions." It is clear, however, that "bad faith" may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation. And, as the Court of Appeals noted, the conduct of this particular litigation was marked by "the dilatory action of the union and its officers . . ." 462 F.2d at 780. Moreover, although the presence of "bad faith" is essential to "fee shifting" under a "punishment" rationale, neither the presence nor "absence" of "bad faith" is in any sense dispositive where attorneys' fees are awarded to the successful plaintiff *under the "common benefit" rationale recognized in Mills and operative today.* (emphasis added).[8]

Consequently, when read in the proper context, it is apparent that the Sixth Circuit was correct in finding that the award of attorney fees in *Hall* was not based on any "bad faith" exception.

In each case cited by this Court in its discussion of the "bad faith" exception in *Hall*, there was some finding

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8. *Hall*, 412 U.S. at 15.

that the defendants had shown bad faith as it related to the conduct of the litigation.[9] In the instant case, at no time during the course of the proceedings has there been a finding that the respondent has conducted the litigation in bad faith. As the Sixth Circuit stated, "there is no indication that the defense of this lawsuit was conducted in bad faith; nor is this a case where the defendant contumaciously refused to allow the plaintiff what was plainly owed, thus forcing the plaintiff to go to court." *Shimman*, 744 F.2d at 1233-34.

Clearly, the underlying rationale for fee-shifting under the "bad faith" exception is punitive in nature. *Hall*, 412 U.S. at 5. In other words, bad faith must exist on the part of the unsuccessful litigant in the course of litigation in order to justify an award of attorney fees under this exception.[10] The District Court in the present case awarded

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9. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (". . . the respondents interposed defenses so patently frivolous that a denial of counsel fees to the petitioners would be manifestly inequitable"; defendants could not and did not undertake at the trial to support their denials); *Vaughan v. Atkinson*, 369 U.S. 527, 528-31 (1962) (defendants did not bother even to admit or deny the validity of that claim, "respondents were callous in their attitude making no investigation of libellant's claim and by their silence neither admitting nor denying it."); *Bell v. School Bd. of Powhatan Cty.*, 321 F.2d 494, 500 (4th Cir. 1963) (equitable remedy of awarding attorney fees because of long continued pattern of evasion and obstruction and other "discreditable" tactics); *Rolax v. Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) (racially discriminatory and oppressive conduct by defendant including continuing to negotiate on their behalf without giving plaintiff opportunity to participate even after suit instituted).

10. Interestingly enough, the case of *Hall v. Cole* is cited precisely for this proposition in the Notes of the Advisory Committee on the 1983 Amendment to Rule 11 of the Federal Rules of Civil Procedure. New Rule 11 provides for the imposition of sanctions—including reasonable attorney fees—if any pleading, motion or other paper is *"interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless in-*

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the $75,000 in attorney fees as a punitive measure against Local 18 pursuant to applicable Ohio law.[11] That award was paid in full, thus fulfilling the punishment associated with the conduct under Ohio law. Absent any additional finding of bad faith during the course of the litigation, there is no articulable theory or basis upon which to award additional attorney fees for work done on appeal.

Petitioner also cites *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), in support of his contention that the "bad faith" exception applies to bad

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crease in the cost of litigation" (emphasis added). The Advisory Committee notably affirmed the principle that attorney fees properly are awarded under the "bad faith" exception only where such bad faith is related to the conduct of the litigation:

> The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney fees, to a litigant *whose opponent acts in bad faith in instituting or conducting litigation. See e.g. Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.

(Notes of Advisory Committee to Rule 11 as amended April 28, 1983, eff. Aug. 1, 1983).

11. In 1975, the District Court entered a judgment against all defendants and awarded attorney fees for services rendered at the trial level, based on the Ohio tort of assault and battery. In the 1980 appeal, a three judge panel reversed the imposition of liability against the International Union, reducing the amount of punitive damages. Shimman then filed an application for additional attorney fees for services rendered during the 1980 appeal. The District Court awarded the additional fees and the Sixth Circuit in the 1983 appeal affirmed the District Court's award of attorney fees for services rendered on appeal. At that point the court stated that the attorney fees would have also been allowed under the "bad faith" exception, based on the acts giving rise to the claim. The *en banc* decision reversed the prior decision by the Sixth Circuit, holding that attorney fees could not be recovered for appellate work under the "bad faith" exception.

faith in the conduct giving rise to the underlying claim. However, as the Sixth Circuit found, the *Alyeska* opinion merely cites to this Court's earlier decisions in *F.D. Rich Co., Inc. v. United States, etc.*, 417 U.S. 116 (1974) and *Vaughan v. Atkinson*, 369 U.S. 527 (1962), as establishing that there is a "bad faith" exception to the American Rule, and not that this Court intended in *Alyeska* to expand the "bad faith" exception to include bad faith in the conduct giving rise to the underlying claim.[12] Specifically, petitioner misinterpreted the holding in *F.D. Rich* in which this Court cited to cases that merely establish that there may be an award of attorney fees when there has been bad faith litigation conduct.[13] Petitioner fails to mention that in a subsequent statement in *F.D. Rich*, this Court cited *Hall* as authority for the "common benefit" exception to the American Rule, while there was no citation to *Hall* as authority for any "bad faith" exception. The absence of a cite to *Hall* with regard to any "bad faith" exception lends further support to the position that this Court in *Hall* merely referred to the "bad faith" exception in dicta, thereby failing to expand the doctrine to include bad faith conduct giving rise to the underlying litigation as a basis for an award of attorney fees. This also undermines petitioner's contention that this Court indicated, in *Alyeska*, its approval of a bad faith award of attorney fees for acts underlying the litigation.

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12. This Court stated in *Alyeska*:

> Also, a court may assess attorneys' fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant' . . . or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .' *F.D. Rich Co.*, 417 U.S., at 129, 40 L.Ed. 2d 703, 94 S.Ct. 2157(citing *Vaughan v. Atkinson*, 369 U.S. 527, 8 L.Ed. 2d 88, 82 S.Ct. 997 (1962); *cf. Universal Oil Products Co. v. Roof Refining Co.*, 328 U.S. 575, 580, 90 L.Ed. 1447, 66 S.Ct. 1176 (1946).

13. *See* Petition for Writ of Certiorari, p. 14.

Petitioner here, as he did before the Sixth Circuit, contends that this Court supports the award of attorney fees for pre-litigation bad faith citing this Court's holding in *Vaughan v. Atkinson*, 369 U.S. 527 (1962). In so doing, petitioner has misinterpreted and overextended this Court's award of attorney fees in *Vaughan*. The Sixth Circuit corrected petitioner's interpretation, observing that in *Vaughan*, there was no finding of bad faith on behalf of the defendants. *Shimman*, 744 F.2d at 1231. Instead, the attorney fees were compensatory, and not punitive in nature.[14] Clearly, this Court's decision in *Vaughan*, correctly interpreted by the Sixth Circuit, cannot be used in support of petitioner's theory.

C. The Sixth Circuit's "Bad Faith" Holding, Denying Attorney Fees for Appellate Work, Is Supported by a Majority of the Circuits

Other courts of appeal properly applying the "bad faith" exception have affirmed the award of attorney fees against a party only where such bad faith is found in the conduct of the litigation, and then only for time expended at the district court level.[15] Once again the issue

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14. Petitioners tacitly admit in their petition that the attorney fee award in *Vaughan* was compensatory in nature. *See* Petition for Writ of Certiorari, p. 15, footnote 14.

15. This is contrary to the contention of petitioners that respondents "cited no decision by any court anywhere in the country holding that the bad faith exception does not apply to bad faith in the acts giving rise to the substantive claim." Petition for Writ of Certiorari, p. 8. *See Lipsig v. National Student Marketing Corp.*, 663 F.2d 178, 181 (D.C. Cir. 1980) (findings that defendants engaged in dilatory tactics during discovery and courtroom hearing, consistently failed to meet scheduled filing deadlines, misused the discovery privilege, and "seriously misled the Court by misquoting or omitting material portions of documentary evidence."); *Stovall v. Price Waterhouse Co.*, 652 F.2d 537, 542 (5th Cir. 1981) (no award of attorneys' fees where

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before the Sixth Circuit was whether attorney fees could be awarded for work done on appeal. Petitioner however offers a list of cases allegedly upholding attorney fee awards solely for bad faith conduct giving rise to the underlying claim.[16] In only one of the cases cited was there an award of attorney fees for work done on appeal and in that case, the court awarded attorney fees upon an equitable theory for the initiation of a frivolous or vexatious lawsuit.[17] Petitioner confuses acts which give rise to the litigation with the initiation of vexatious lawsuits, by referring to both as pre-litigation acts of bad faith.

Petitioner maintains that the Sixth Circuit's "bad faith" holding is contrary to other circuit courts, however the cases cited fail to base their holdings on the "bad faith" exception.[18] In addition, petitioner cites cases that

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party not in complete bad faith nor pursued appeal for frivolous reasons); *Perkins State Bank v. Connolly,* 632 F.2d 1306 (5th Cir. 1980) (award reversed where appellate court disagreed with lower court finding of oppressive behavior); *Copeland v. Martinez,* 603 F.2d 981, 983 (D.C. Cir. 1979) (award affirmed where plaintiff acted vexatiously, maliciously and in bad faith and intentionally abused the judicial process); *Straub v. Vaisman and Co.,* 540 F.2d 591 (3d Cir. 1976) (no award of fees where bad faith or vexatious conduct did not occur during the litigation process).

16. *See* Petition for Writ of Certiorari, p. 8, footnote 3.

17. *McEnteggart v. Cataldo,* 451 F.2d 1109 (1st Cir. 1971), *cert. denied,* 408 U.S. 943 (1972).

18. *See Schlein v. Smith,* 160 F.2d 22 (D.C. Cir. 1947) (Sixth Circuit held this case was inapplicable because it involved an attorney fee award as part of punitives in a willful fraud case, as opposed to an attorney fee award for a federal statutory claim for which punitives are inappropriate.); *Rolax v. Atlantic Coast Line R. Co.,* 186 F.2d 473 (4th Cir. 1951) (The Sixth Circuit correctly held that this case was based on the "common benefit" rationale, although that terminology was not available to the *Rolax* court because *Mills v. Electric Auto-Lite Co.,* 396

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fail to approve attorney fees for pre-litigation bad faith as an alternative to another exception or in conjunction with another exception.[19] Only one of those cases was based on the issue of whether attorney fees are available for work done on appeal.[20]

Contrary to decisions in both the Eighth and Ninth Circuits, the Sixth Circuit correctly interpreted *Hall* and *Alyeska*. In *Richardson v. Communication Workers*, 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976), cited by petitioner in support of petitioner's "bad faith" theory, the Eighth Circuit cited *Alyeska* as expanding the "bad faith" exception to the American Rule to bad faith in the acts giving rise to the action. However, as established previously, *Alyeska* merely cited to *F.D. Rich Co.* and *Vaughan* as establishing that there existed a "bad faith" exception; *Alyeska* did not purport to expand that exception to include bad faith giving rise to the litigation. Furthermore, the Sixth Circuit's correct interpretation of *Hall* properly disagreed with the holding of the Ninth Circuit in *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983). In *McQuiston*, the court incorrectly cited to *Hall* in support of the theory that attorney fees could be awarded for bad faith in either the acts giving

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Footnote continued—

U.S. 375 (1970) and *Hall v. Cole*, 412 U.S. (1975) had not yet been decided); *Bell v. School Board of Powhatan Cty., Virginia*, 321 F.2d 494 (4th Cir. 1963) (*en banc*) (a decision based on *Rolax* and based on general theory of equity); *Huecker v. Milburn*, 538 F.2d 1241 (6th Cir. 1976) (The Sixth Circuit correctly held that in *Huecker*, the Sixth Circuit made some statements in dicta which should not be considered to be inconsistent with its holding in the instant case).

19. See cases cited by petitioner in Petition for Writ of Certiorari, pages 9 and 10, footnotes 4 through 7.

20. *See Doe v. Poelker*, 515 F.2d 541 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 519 (1977) (per curiam).

rise to the litigation or occurring during the course of the litigation. The Ninth Circuit remanded the case to determine whether the facts warranted an award of attorney fees for work done at the trial level only. As the Sixth Circuit's interpretation of both *Alyeska* and *Hall* was correct, it should stand. The disagreement between the Sixth, Eighth and Ninth Circuits does not constitute substantial conflict among the circuits, sufficient to warrant the intervention of this Court.

D. The Sixth Circuit Correctly Decided That the "Common Benefit" Theory Is Inapplicable in the Present Case

Petitioner's contention that the District Court's award of attorney fees can be supported by the "common benefit" exception to the American Rule is erroneous, considering that both the District Court and the Sixth Circuit have held that the "common benefit" theory is inapplicable in the instant action. The "common benefit" theory poses another exception to the American Rule on attorney fees. The rationale behind the theory is that because a substantial benefit is conferred upon an ascertainable class, the cost of obtaining such benefit should be spread among the entire class on a proportional basis. The "common benefit" exception was adopted for use in LMRDA cases by this Court in *Hall v. Cole*, 412 U.S. 1 (1973). This Court held in *Hall*, that the plaintiff, by vindicating his own right to free speech, rendered a substantial service or "common benefit" to the Union as an institution, and to all of its members.

In terms of "common benefit", the facts of the present case present a stark contrast to those of *Hall*. Shimman was awarded compensatory and punitive damages for his own personal injuries, and obtained no other relief bene-

fitting other Union members.[21] The Sixth Circuit correctly rejected Shimman's argument that although the monetary awards of compensatory and punitive damages were not held in common, a substantial benefit was rendered to the Union membership by "restoring democracy". Both *Hall* and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970) require "that the benefit be received in common by those against whom the fee award operates." *Shimman*, 744 F.2d at 1235. Even if Shimman did "restore democracy" to the Union, any benefit arising from this is incidental and insufficient to warrant a fee award. Any such burden of a fee award must be received in proportion to the benefit imposed on the whole class, including Shimman.[22] If the fee award were upheld based on the "common benefit" theory, Shimman would pay no greater portion of the fees than other Union members who received the incidental benefit of Shimman's "catalyst", although Shimman received approximately $107,000 in compensatory damages and $145,000 in punitive damages, Shimman would therefore receive a disproportionate benefit.

The present case does not involve a situation in which Shimman brought an action for injuries shared by other Union members. Thus, this was not a case where the cost of the litigation is shifted to "the class that benefited from

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21. In the 1980 appeal, the Sixth Circuit stated that "this suit only seeks redress of one of the dissidents' wrongs" and in turn reduced the amount of punitive damages by $150,000 because "the ones who will end up paying for the punitive damages award are the union members." *Shimman*, 625 F.2d at 102-03. In other words, the Sixth Circuit reasoned that any excessive punitive award would result in a "common detriment" as opposed to "common benefit".

22. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Hall v. Cole*, 412 U.S. 5 (1975); *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom.*, 421 U.S. 240 (1975); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975).

them [the costs of litigation] and that would have had to pay them [the costs of litigation] had it brought the suit." *Hall*, 412 U.S. at 7, *Mills*, 396 U.S. at 397. Shimman's injuries were personal injuries for which other Union members could not seek redress. Petitioner is requesting attorney fees from the Union membership which are disproportionate to any residual benefit which may have been conferred onto the Union membership by his "catalyst". Thus, the Sixth Circuit correctly determined that the "common benefit" theory is inapplicable in the present case.

Petitioner incorrectly asserts that the Sixth Circuit's *en banc* opinion conflicts with decisions in six other circuits. In support of this contention, petitioner refers to cases in which the benefit received by the Union members was far more tangible and substantial than petitioner's "catalyst".[23] Similarly, petitioner inappropriately relies upon cases in which relief is sought based on a Union's

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23. *Bise v. International Brotherhood of Electrical Workers*, 618 F.2d 1299 (9th Cir. 1979), *cert. denied*, 449 U.S. 904 (1980) (both monetary damages and an injunction were granted to the Union members for prohibitive disciplinary actions); *Rosario v. Amalgamated Ladies Garment Cutters' Union, Local 10*, 605 F.2d 1228 (2d Cir. 1979), *cert. denied*, 446 U.S. 919 (1980) (both an injunction and punitive damages were awarded to Union members who sought a nullification of the Union's internal disciplinary proceedings); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (9th Cir. 1977) (the award was granted for the Union's breach of its duty of fair representation and the court held that by protecting the Union members' rights to be hired directly by an employer or through a specific request to the Union, there was a substantial service to the Union and to the persons it represented); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), *cert. denied*, 429 U.S. 817 (1976) (relief sought against the Union in order to remedy a refusal to install duly elected Union officers and to discontinue an invalid trusteeship). These decisions are in agreement with the position of the Sixth Circuit that there must be a substantial benefit conferred, even though there is no mention of the specific proportionality language of *Hall* and *Mills*.

breach of its duty of fair representation[24] as support for petitioner's theory that the "catalyst" provided by petitioner was a sufficient benefit conferred upon a common class to justify attorney fees.[25] Relief granted to Union members as a result of a breach of the duty of fair representation is illustrative of an action brought for injuries shared by other Union members, whereas the action brought by petitioner did not seek such relief. In addition, there is a substantial common benefit to Union membership when the Union is held to its duty of fair representation. Consequently, the cases cited by petitioner involving a breach of the Union's duty of fair representation do not conflict with the Sixth Circuit's decision in the present action.

E. Petitioner Fails to Pose a Question for This Court on His §§1985 and 1986 Claims Absent Discrimination Against a Constitutionally Protected Class

The Sixth Circuit correctly rejected the petitioner's claim that because his rights were violated under 42 U.S.C. §1985(3) and §1986, he is entitled to attorney fees under 42 U.S.C. §1988.[26] These claims were dismissed by the

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24. *See Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975) (per curiam), *cert. denied*, 425 U.S. 958 (1976); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir. 1981); *Stein v. Mutual Clerks' Guild of Mass., Inc.*, 560 F.2d 486 (1st Cir. 1977); *Bradford v. Textile Workers of America*, 563 F.2d 1138 (4th Cir. 1977); *Emmanuel v. Omaha Carpenters District Council*, 560 F.2d 382 (9th Cir. 1977).

25. Similar reasoning applies to the petitioner's erroneous application of the following case to the instant action: *Maceira v. Pagan*, 698 F.2d 38 (1st Cir. 1983) (Award sought for the reinstatement of a Union steward, awarded by the Union members poses a common benefit).

26. The Sixth Circuit correctly decided not to discuss the §§1985(3) and 1986 claims separately, because the §1986 claim is based on the §1985(3) claim. *Shimman*, 744 F.2d at 1236, footnote 15.

District Court, and the Sixth Circuit panel in the 1980 appeal refused to address Shimman's cross-appeal of that dismissal. This is not a case which involves a constitutionally protected civil right; instead, it involves rights granted by statute and protected by the National Labor Relations Board. Thus, the Sixth Circuit sitting *en banc* correctly held the petitioner's §1985(3) claim to be insubstantial because he failed to allege or prove the kind of racially discriminatory intent necessary to establish such a violation. In addition, because the civil rights claims made by petitioner are unrelated to the success of his LMRDA claims, petitioner could not be entitled to attorney fees under §1988.

Petitioner's claim is unrelated to a constitutionally protected right. In *Maher v. Gagne,* 448 U.S. 122 (1980), this Court held that attorney fees are granted under §1988 "in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim" regardless of the outcome of the civil rights claim.[27] Section 1988 also provides for an attorney fee award for a plaintiff who is successful on a state law claim pendent to a substantial federal civil rights claim left undecided.[28] However, petitioner's claim is neither a substantial civil rights claim nor a constitutional claim.

Petitioner erroneously claims that the present case involves a civil rights violation because there is a conspiracy to deprive dissident Union members of the equal protection of the LMRDA. However, this Court clearly set forth the requirements for the type of discriminatory intent necessary to prove a §1985(3) claim, holding:

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27. 448 U.S. at 130-33.

28. *See Seals v. Quarterly County Court,* 562 F.2d 390 (6th Cir. 1977).

> [t]he language [in §1985(3)] requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. (Emphasis in original; footnote omitted).[29]

Certainly, as the Sixth Circuit decided, there is no "invidious" discrimination against a constitutionally protected "class" in this case; instead, petitioner's group of dissidents is an "arbitrarily-chosen group."[30]

Petitioner cites this Court's decision in *Hagans v. Lavine*, 415 U.S. 528 (1974), as support for the proposition that his §§1985(3) and 1986 claims were substantial. Petitioner neglected to cite in its entirety this Court's rationale with regard to the substantiality doctrine, by thus failing to include the clarifying statement immediately following petitioner's cited quote. That statement is as follows:

> The substantiality doctrine as a statement of jurisdictional principles affecting the power of a federal court to adjudicate constitutional claims has been questioned . . . But it remains the federal rule and *needs no reexamination here, for we are convinced that within accepted doctrine petitioners' complaint alleged a constitutional claim sufficient to confer jurisdiction on the District Court to pass on the controversy.* (Emphasis added).

The claim made in *Hagans* was substantial in part because it challenged the constitutionality of state action which deprived persons of their constitutional rights within the

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29. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), as cited in *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984).

30. *Shimman*, 744 F.2d at 1237.

meaning of §1983 and §1343(3).[31] Petitioner's claims in the present case are quite distinct, and remain insubstantial in light of *Hagans*, since there is neither a substantial civil rights claim nor a constitutional claim.

In *United Brotherhood of Carpenters v. Scott*, 103 S.Ct. 3352 (1983), this Court applied the *Griffin* §1985(3) standard in a Title 29 action holding that §1985(3) could not be applied to conspiracies involving animus against non-union workers. The Sixth Circuit correctly refused to apply §1985(3) to animus between two union groups, in light of this Court's decision in *Scott*, reasoning that "if §1985(3) does not reach animus against non-union workers, it certainly does not reach animus one union faction holds for another."[32] Thus, under either *Griffin* or *Scott*, the petitioner's §1985(3) claims are insubstantial and attorney fees, therefore, may not be awarded under §1988.

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31. The claim was also substantial because there were indications of equal protection violations and the rational basis of the state regulation was in question.

32. *Shimman*, 744 F.2d at 1236-37.

CONCLUSION

In light of the absence of substantial conflict among the circuits with regard to the Sixth Circuit's holding in the present action, and of an absence of a substantial civil rights claim or constitutional claim, the respondent respectfully requests this Court to deny the instant petition, thus preventing the petitioner from recovering attorney fees for services rendered on appeal.

Respectfully submitted,

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